Cause No. 92-7549

ORIGINAL

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1992

THOMAS N. SCHIRO,

Petitioner,

v.

RICHARD CLARK, Superintendent, Indiana State Prison, et. al.,

Respondents.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Petition for Writ of Certiorari

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Question Presented for Review

Whether double jeopardy and collateral estoppel prohibit the State from proceeding to a death penalty phase when the jury has acquitted the defendant in the guilt phase of the offense which the State is required to prove beyond a reasonable doubt in order to sustain the death sentence?

Parties to the Action

The names of all parties to the action in the lower court appear in the caption to this case.

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I. OPINIONS OF OTHER COURTS

On August 5, 1983 the Indiana Supreme Court issued an opinion on direct appeal affirming, by a 3-2 majority, Schiro's convictions and death sentence. Schiro v. State , 451 N.E.2d 1047 (Ind. 1983). Certiorari was then denied by this Court. Schiro v. Indiana, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983).

On June 28, 1985 the Indiana Supreme Court issued an opinion, affirming by a 3-1 majority, the denial of state post-conviction relief. Schiro v. State, 479 N.E.2d 556 (Ind. 1985). Certiorari was then denied by this Court. Schiro v. Indiana, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (1986).

On February 8, 1989 the Indiana Supreme Court issued an opinion affirming, by a 3-2 majority, the denial of state post-conviction relief. Schiro v. State, 533 N.E.2d 1201 (Ind., 1989). Certiorari was then denied by this Court. Schiro v. Indiana, 493 U.S. 910, 110 S.Ct. 268, 107 L.Ed.2d 218 (1989).

On December 26, 1990 the district court issued an opinion denying habeas relief. Schiro v. Clark, 754 F. Supp. 646 (N.D.Ind. 1990). On May 8, 1992 the Seventh Circuit Court of Appeals affirmed the district court's denial of habeas corpus relief. Schiro v. Clark, 963 F.2d 962 (7th Cir., 1992). Rehearing and Suggestion for Rehearing En Banc was denied, without opinion, by the Circuit Court on September 8, 1992.

On December 1, 1992 Mr. Justice Stevens extended the time for filing this Petition for Writ of Certiorari to and including February 5, 1993.

II. JURISDICTIONAL STATEMENT

The jurisdiction of this Court to entertain petitions for certiorari from the affirmance of

the denial of habeas corpus relief is invoked pursuant to 28 U.S.C. § 1254(1) and United States Supreme Court Rule 10.

III. CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

A. CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

AMENDMENT 14

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. STATE STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Indiana Code 35-41-2-2

(a) A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so.

(b) A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so.

(c) A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.

(d) Unless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct.

Indiana Code 35-42-1-1

A person who:

(1) knowingly or intentionally kills another human being; or

(2) kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery;

commits murder, a felony.

Indiana Code 35-50-2-9

This provision of the state code sets forth the death penalty provisions of state law and is reprinted in the appendix to this petition.

IV. STATEMENT OF THE CASE

Schiro was originally charged with three counts of murder for the death of a single victim: Count 1, "knowing" murder; Count 2, felony murder (rape); and Count 3, felony murder (criminal deviate conduct).[1] The State additionally alleged the existence of two aggravating circumstances to support its request for the death penalty: an intentional killing in the course of a rape, and an intentional killing in the course of criminal deviate conduct. Under Indiana law, before the jury may weigh the aggravating circumstances against the mitigating

[1] Indiana Code 35-42-1-1 defines murder. It provides that: "[a] person who: (1) knowingly or intentionally kills another human being; or (2) kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, rape or robbery; commits murder, a felony."

circumstances, the State must prove the existence of each element of at least one aggravating circumstance beyond a reasonable doubt. Ind. Code 35-50-2-9(e)(1).

At trial, Schiro raised a special plea of not responsible by reason of insanity. In part because of this, the jury was given ten (10) possible verdict forms at the close of the guilt phase.[2]

The jury returned one "guilty" verdict. They found Schiro guilty of Count II, felony murder (in the course of a rape). This charge required no *mens rea* as to the killing - the only *mens rea* element applied to the intent to commit the underlying felony. The jury did not return a verdict on the murder charge which required an intent to kill (Count I). Nevertheless, the case proceeded to the penalty trial on the charged aggravators (both of which required the State to prove beyond a reasonable doubt that the killing was intentional).

After deliberating for sixty-one (61) minutes, the jury returned with their unanimous recommendation: the death penalty was not appropriate for Thomas Schiro. Approximately 18 days later, Schiro stood before the court for sentencing.[3] Within minutes, the considered judgement of twelve members of the community was overridden and Schiro was sentenced to death.

Prior to the direct appeal decision in this case the Indiana Supreme Court found the

[2] The verdict forms provided were: (1) Guilty as charged on Count I; (2) Guilty as charged on Count II; (3) Guilty as charged on Count III; (4) Guilty of the lesser included offense of "voluntary manslaughter"; (5) Guilty of the lesser included offense of "involuntary manslaughter"; (6) "Not guilty"; (7) Not guilty by reason of insanity; (8) Guilty of "Murder", but mentally ill; (9) Guilty of voluntary manslaughter, but mentally ill; and (10) Guilty of involuntary manslaughter, but mentally ill.

[3] Indiana is one of only three states that permits the judge to override a jury's recommendation as to punishment; the other states are Florida and Alabama.

"original findings in this action did not set out clearly and properly the trial court's reasons for imposing the death penalty." Schiro v. State, 451 N.E.2d at 1056. Thus, the Indiana Supreme Court ordered the trial court to submit new reasons justifying imposition of the death sentence. Id.

Schiro's case has been before the Indiana Supreme Court three times. There was never a unanimous affirmance[4]: the vote on direct appeal was 3-2; the vote on first post-conviction appeal was 3-1; and the vote on second post-conviction appeal was 3-2.

Schiro alleges herein that his constitutionally guaranteed right to be free from being twice put in jeopardy was violated at his capital trial. The violation occurred when the State was permitted to proceed to the penalty phase of his capital trial after the jury had acquitted him of a "knowing" killing. The two aggravating circumstances alleged by the State were the only two that were arguably present in this case. Yet, both of these aggravating circumstances required the State to prove beyond a reasonable doubt that the defendant entertained an "intentional" state of mind when he committed the killing. Under state law a person cannot act "intentionally" without also acting "knowingly".

Schiro first raised the claim contained in this petition in his second state post-conviction relief petition. By a 3-2 vote, the Indiana Supreme Court denied relief on the merits. In so holding, the court stated:

> The crimes of murder and felony murder each contain elements different from the other but are equal in rank. One is not an included offense of the other and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and

[4] Mr. Justice Stevens has stated that each time the state appellate court reviewed this case, the sentence was affirmed by a "bare majority" of the court. Schiro v. Indiana, 110 S. Ct. 268 at 269 (1989) (Stevens, respecting the denial of cert.).

> remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider. Count I here, under I.C.35-42-1-1(1), did not charge Schiro with intentionally killing but with knowingly killing. Thus the jury in the guilt phase never confronted the issue of intentional killing and its verdict could not be considered to have included any conclusion on that issue. The court then properly proceeded to the penalty phase pursuant to I.C. 35-50-2-9, *and the jury determined that the aggravating circumstance existed and that Schiro committed the murder by intentionally killing the victim while committing or attempting to commit rape and criminal deviate conduct.* In the same statute, §(9)(e) provides that the judge is not bound by the recommendation of the jury, however, he must base his decision upon the same standard the jury was required to consider. The jury made their finding and the trial judge subsequently made his.

Schiro v. State, 533 N.E.2d at 1208 (Ind. 1989) [emphasis added].

The state court is in error when it notes that the jury determined that the aggravating circumstance existed. In fact, the jury never made such a finding. The jury acquitted Schiro at the guilt phase of the only murder charge which contained a *mens rea* element. The jury then unanimously recommended *against* the death penalty.

Justices DeBruler and Dickson dissented on this claim and held that Schiro was entitled to post-conviction relief in the form of a new sentence of years upon the conviction of felony murder. In so holding the dissenters noted:

> The jury was charged on all counts, and returned but a single verdict, namely guilty on Count II. As to the other counts, the verdict was entirely silent in regard to guilt or innocence of appellant. The law requires that the jury verdict be deemed the legal equivalent of verdicts that the defendant is not guilty of the felonies charged in Counts I and III. Buckner v. State (1969) 252 Ind. 379, 248 N.E.2d 348, Smith v. State (1951) 229 Ind. 546, 99 N.E.2d 417.
>
> ...In my view, the silent verdict of the jury on Count I, charging a knowing state of mind, must be deemed the constitutional equivalent of a final and immutable rejection of the State's claim that appellant deserves to die because he had an intentional state of mind. That verdict acquitted appellant of that condition which was necessary to impose the death penalty under this charge. [citation omitted] The difference in the two states of mind is insignificant and too esoteric in this instance. In the one, a person acts with awareness that he is so acting. In the other, a person acts with an objective to so act. I.C. 35-41-2-2. To accord the difference, one would have to believe that a person can

be presently unaware that he is strangling another, while at the same time having a goal presently in mind to strangle such other person.

Id. at 1208-1209 (DeBruler, J., dissenting).

Mr. Justice Stevens issued an opinion "respecting the denial of the petition for writ of certiorari" after the denial of Schiro's second state post-conviction action. Mr. Justice Stevens' opinion was directed to the double jeopardy claim raised and addressed on the merits in the Indiana Supreme Court and presented herein at page 8. In that opinion, Justice Stevens implied that this Court was denying *certiorari* because of its heavy docket and the knowledge that the issue would again be presented to the Court following federal review. Justice Stevens stated:

> It cannot be disputed that petitioner was placed in jeopardy within the meaning of the Fifth Amendment to the Federal Constitution when the trial on Count I commenced. [Citation omitted]. The fact that Indiana may not consider the jury's silence an "acquittal" as a matter of state law surely does not determine the constitutional question whether he could again be placed in jeopardy on the same charge. [citation omitted]. Nor does it determine whether the action by the jury--especially when illuminated by its unanimous decision at the penalty hearing--should be given preclusive effect either under the principles of double jeopardy in capital cases ...[citation omitted], or under more general principles of collateral estoppel.

Schiro v. Indiana, 493 U.S. 910, 110 S.Ct. 268 at 268, 107 L.Ed.2d 218 (1989).

After discussion of Schiro's double jeopardy claim, Mr. Justice Stevens stated:

> These, as well as the other federal questions that petitioner has raised in the state courts, are open to and will presumably receive careful consideration from the federal court with habeas corpus jurisdiction over the case. (footnote omitted)

Schiro v. Indiana, 110 S.Ct. 268 at 270 (Stevens, respecting the denial of petition for certiorari).

The jurisdiction of the federal courts was invoked pursuant to 28 U.S.C. § 2254. Both the federal district court and circuit court of appeals denied relief on this claim finding that the silent verdicts did not constitute an acquittal under state law. Schiro v. Clark, 754 F. Supp. at

660; Schiro v. Clark, 963 F.2d at 970. Neither of these courts mentioned the plethora of state court cases dating back to 1844 which are cited herein at pages 11-12 and which hold that a silent verdict *is* an acquittal in Indiana.

Schiro now requests that this Court grant him the careful consideration that Mr. Justice Stevens presumed would be forth coming from the federal courts with habeas corpus jurisdiction.

V. REASONS FOR GRANTING THE WRIT

This Court should grant the writ because Schiro's death sentence was barred by double jeopardy and collateral estoppel in violation of the United States Constitution, Amends. V, VIII, and XIV. The decisions of the United States Court of Appeals for the Seventh Circuit and the Indiana Supreme Court are such a severe departure from this Court's precedent in Arizona v. Rumsey, 467 U.S. 203, 104 S. Ct. 2305, 81 L.Ed.2d 164 (1984); Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1980); Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); and Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) that this Court should grant the writ to correct the misinterpretation of those cases.

Both the district court and the court of appeals relied in part on Spaziano v. Florida, 468 U.S. 447,104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) to dismiss Schiro's constitutional challenge to the imposition of the death penalty in his case. The lower courts' reliance upon Spaziano is incorrect because the critical event in this case occurred not when the jury returned its unanimous recommendation against imposition of the death penalty, but when the jury acquitted Schiro of Counts I and III in the *guilt phase*. The court below was unquestionably correct when it noted that Spaziano stands for the general proposition that a state law is not *per se*

unconstitutional just because it permits a trial judge to impose a death sentence over a jury recommendation of life. The Seventh Circuit erred, however, by assuming that Spaziano somehow preempts all other constitutional protections, and permits a judicial override regardless of the facts of the case. This proposition is simply incorrect. A judicial pronouncement of death which on its face violates the Double Jeopardy Clause, is not cured of constitutional infirmity by Spaziano's theoretical approval of override statutes.

A. WHEN DOES JEOPARDY ATTACH?

Jeopardy attached when Thomas Schiro's jury was sworn. Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed. 2d 24 (1978); In Kepner v. United States, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904); Tyson v. State, 543 N.E.2d 415 (Ind. 1989); Indiana Code 35-41-4-3(2).

B. THE CRITICAL EVENT

The dispositive event in this case occurred when the jury returned their verdict at the close of the *guilt phase*. Schiro was charged with three counts of murder, all arising from a single death: Count I, "knowing" murder[5]; Count II, felony murder (rape); and Count III, felony murder (criminal deviate conduct).[6]

The jury was presented with ten (10) different verdict forms.[7] Three of these forms separately provided for a finding of "guilty as charged" on Counts I-III, respectively. Only one (1) general verdict form was provided for a "not guilty" verdict. The jury was not provided

[5] Under Indiana law " [a] person engages in conduct 'knowingly' if, when he engages in the conduct he is aware of a high probability that he is doing so." Indiana Code 35-41-2-2(b). Under Indiana law "[a] person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so. Indiana Code 35-41-2-2(a).

[6] The definitions of murder as provided by state law are contained in footnote 1, supra.

[7] The verdict forms submitted are set forth in footnote 2, supra.

with three (3) separate verdict forms for "not guilty" on each of the charges contained in Counts I-III.

Since the jury was only presented with a single "not guilty" verdict form that covered all three counts, the only way for the jury to demonstrate that it found Schiro guilty of Count II, and not guilty on Counts I and III, was to return the Count II "guilty" verdict form alone. If it returned the "not guilty" form, reasonable jurors could assume that action could be interpreted to mean that they found Thomas Schiro both guilty and not guilty of Count II.

After deliberating for over five (5) hours, the jury returned a single verdict: it found Schiro guilty of Count II, felony murder (rape). It impliedly acquitted Schiro of both Count I, murder (the only charge which required proof of intent to kill), and Count III, felony murder (criminal deviate conduct). These verdicts are important in this case because the two aggravators charged by the State required the State to prove beyond a reasonable doubt that the killing was intentionally committed.

1. Was there an implied acquittal?

The failure to return a verdict on Counts I ("knowing" murder) and III (felony murder, criminal deviate conduct) amounted to an implied acquittal under Indiana and federal law. The Circuit Court found that "[i]n order to assess the effect of the jury's findings, this Court looks to State law." (citation omitted) Schiro v. Clark, 963 F.2d 962, 970 (7th Cir. 1992). In rejecting Schiro's double jeopardy claim, the panel concluded that a silent verdict on the "knowing murder" count "did not amount to an acquittal under state law." Id.

Irrespective of whether state or federal law controls, a silent verdict is the legal equivalent of an acquittal. Both require the conclusion that the facts yield an implied acquittal.

(a) Federal Law. While the panel opinion finds state law to be controlling on whether a silent verdict is an implied acquittal, Schiro notes that previous decisions of this Court have held federal standards, not state, apply. Crist v. Bretz, supra; Benton v. Maryland, supra.

In Green v. United States, supra, the defendant was charged with first degree murder. The jury convicted him of the lesser offense of second degree murder, but was silent as to the first degree murder charge. Green's conviction of second degree murder was reversed on appeal due to trial error. He was subsequently convicted of the original first degree murder charge. This Court held that the double jeopardy clause barred retrial on that charge. In so holding this Court noted:

> [T]he result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. *Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense....In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: "We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree."*

Id. at 191, 78 S. Ct. at 225 (emphasis added).

(b) Indiana Law. Even if state law controls, the silent verdict amounts to an acquittal. Where at least one verdict is returned in a multi-count charge and the jury remains silent on the remaining counts, the "silent verdict" amounts to an acquittal under the Indiana Constitution. Weinzorpflin v. State, 7 Blackf. 186, 194 (Ind. 1844) (Where defendant charged with 3 counts and the jury returned a guilty verdict on Count I, and was silent as to the remaining counts, Indiana Supreme Court held, interpreting "our own constitution," that "as to [the silent] counts,

the proceeding against him are equivalent to an express verdict of not guilty...") See also Buckner v. State, 253 Ind. 379, 248 N.E.2d 348, 351 (1969) ("Silence of the court on Count I is equivalent to a verdict of acquittal."); Smith v. State, 229 Ind. 546, 99 N.E.2d 417, 418 (1951) (same); Dawson v. State, 65 Ind. 442, 443-44 (1879) ("[N]o express finding was had upon second count. This was a legal acquittal of the larceny, and leaves the case before us the same as if the second count of the indictment was not in the record."); Bonnell v. State, 64 Ind. 498, 499 (1878) ("[T]he verdict of the jury was entirely silent as to the second count of the indictment. This silence of the verdict was equivalent to an express verdict of not guilty as to the second count of the indictment."); Short v. State, 63 Ind. 376 (1878) (same); Bittings v. State, 56 Ind. 101 (1877) (same). See also, Tinker v. State, 549 N.E.2d 1065 (Ind. 1990) (same).

Schiro's case represents the only time that the state courts have held that a silent verdict represents anything other than an acquittal. Such a result creates an independent due process violation. Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). Where, as here, the State provides that a silent verdict constitutes an acquittal, a defendant has a substantial and legitimate expectation that he will be deprived of his liberty, and indeed his life, only consistent with that rule of law. It is a liberty and life interest which the Fourteenth Amendment preserves against arbitrary deprivation by the State. Id. The State simply cannot create rules of law which it applies to all accused persons but one.

Thus, Schiro has established that under federal or state law, the jury's silence on the "knowing" killing was tantamount to an acquittal. As in Green, the jury's verdict must be interpreted as though it expressly stated: "We find the defendant not guilty of knowing murder

and felony murder (with criminal deviate conduct) but find him guilty of felony murder (rape)."

2. *Effect of the Implied Acquittal on the Death Penalty*

The acquittals on Counts I and III are directly linked to charged aggravation. The two aggravating circumstances alleged by the State in support of its request for the death penalty were: (1) the intentional k...g during a rape; and (2) the intentional killing during criminal deviate conduct. I.C. 35-50-2-9(b)(1). In order to properly sentence Schiro to death on the charged aggravating factors, the trier(s) of fact[8] had to determine that Schiro "intentionally" killed. Schiro could be lawfully sentenced to death only if the state proved beyond a reasonable doubt that the killing was "intentional" and committed during the course of or during the attempt to commit rape or criminal deviate conduct. I.C. 35-50-2-9(b)(1), Tr.R. 52-53.

The distinction between the "intentional" element necessary to support a death verdict and the "knowing" element which was contained in the charge on Count I is set out by state statute. Under state law "[a] person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." I.C. 35-41-2-2(a). "A person engages in conduct 'knowingly' if, when he engages in the conduct he is aware of a high probability he is doing so." I.C. 35-41-2-2(b). The "intentional" state of mind requires even greater proof than a "knowing" state. Case v. State, 458 N.E.2d 223, 225 (Ind. 1984). In Trevino v. State, 428

[8] In Indiana the jury hears the evidence at the penalty phase. It issues a recommendation to the court regarding sentencing. The court then ultimately determines the appropriate sentence. The court must base its sentence on the same standards the jury was required to consider. Ind. Code 35-50-2-9(e). In 1989, the Indiana Supreme Court for the first time "develop[ed] a standard appropriate to the separate roles of judge and jury." Chavez v. State, 534 N.E.2d 731, 734 (Ind. 1989). "In order to sentence a defendant to death after the jury has recommended against death, the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate in light of the offender and his crime. Id. at 735.

N.E.2d 263, 267 (Ind. App. 1981) the court stated: "The highest degree of culpability is 'intentionally.' If conduct is engaged in 'intentionally,' it necessarily follows that it must be engaged in 'knowingly' also." As Justice DeBruler noted in his dissenting opinion from the affirmance of Schiro's second state post-conviction action:

> The difference in the two states of mind is insignificant and too esoteric in this instance. In the one, a person acts with awareness that he is so acting. In the other, a person acts with an objective to so act. I.C. 35-41-2-2. To accord the difference, one would have to believe that a person can be presently unaware that he is strangling another, while at the same time having a goal presently in mind to strangle such other person.

Schiro v. State, 533 N.E.2d 1201, 1209 (Ind. 1989)(DeBruler, dissenting).

Since the jury had already determined that Schiro did not possess the requisite intent to kill by virtue of their implicit acquittal on Count I at the guilt phase[9], it is not at all surprising that the twelve (12) member jury unanimously recommended against the death penalty in sixty-one (61) minutes.[10] While the jury's unanimous decision to recommend against the death penalty is noteworthy, it is not dispositive of this issue. The important fact is the acquittal at the *guilt* phase, and the fact that the acquitted offense and the facts supporting the crime upon

[9] The fact that the jury concluded that the State failed to prove the *mens rea* element of the offense is established by their implicit acquittal on Count I and the conviction on Count II. The jury obviously found that Schiro had killed the decedent as evidenced by their conviction on Count II. Both Count I and Count II require the State to prove that the defendant killed another person. The only element which is contained in Count I that is not contained in Count II is the *mens rea* requirement.

[10] In addition to acquitting Schiro of Count I (knowing murder) at the guilt phase, the jury also acquitted Schiro on Count III, felony murder (criminal deviate conduct). Criminal deviate conduct was also an element of one of the charged aggravators. I.C. 35-50-2-9(b)(1). The guilt phase acquittal on Count III, in conjunction with its acquittal on Count I, also amounts to an acquittal of the charged aggravator which required the State to prove beyond a reasonable doubt that Schiro intentionally killed the decedent while committing or attempting to commit criminal deviate conduct.

which the acquittal rests, were the sole statutory basis used by the trial court in imposing death. In essence, the acquittal required a termination of the proceedings after the verdict of guilty on Count II; required the judge to sentence Schiro on that Count; and prohibited consideration and imposition of the death penalty.

C. PRINCIPLES OF DOUBLE JEOPARDY & COLLATERAL ESTOPPEL REQUIRE THIS COURT TO VACATE THE DEATH SENTENCE

1. Double Jeopardy

The historical underpinnings of the double jeopardy prohibition are most eloquently described in the oft-quoted passage from Green v. United States, supra:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187, 78 S.Ct. at 223.

In Bullington v. Missouri, 451 U.S. 430, 446, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) this Court explained the applicability of the above considerations in the capital sentencing process:

> The 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,'...thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment. Missouri's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the State, not the defendant, that should bear 'almost the entire risk of error.' [citation omitted].
>
> It is well established that the penalty phase of a capital trial, whether it be before judge

or jury, is a "trial" for double jeopardy purposes. Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). Bullington, supra.[11] The facts at issue herein are even more compelling than the above-cited cases because Schiro was acquitted at the *guilt phase* of trial. Schiro was thrice put in jeopardy on the issue of intent: at the guilt trial; at the penalty trial before the jury; and at the sentencing trial before the judge. The double jeopardy clause of the United States Constitution simply does not permit an accused person to be put in jeopardy twice, much less three times[12].

2. Collateral Estoppel

It is firmly established that collateral estoppel applies to criminal prosecutions as an element of the double jeopardy clause of the 5th Amendment. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). The doctrine of collateral estoppel "has the dual

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[11] As with the Missouri death penalty statute at issue in Bullington and the Arizona statute in Rumsey, Indiana's death penalty sentencing scheme (before the penalty jury and sentencing judge) also has the hallmarks of a trial: the state must prove the aggravating circumstance(s) beyond a reasonable doubt [I.C. 35-50-2-9(b)]; the defendant has the right to confront and cross-examine witnesses the state claims supports the aggravating circumstances (Id.); the defendant has the right to present witnesses on his own behalf [I.C. 35-50-2-9(c)]; the sentencer's discretion is limited to an imposition of (or recommendation for) death or imposition of a definite period of time on murder (or recommend against the death penalty); the judge must enter written findings of fact demonstrating its reasons for imposition of sentence, Judy v. State, 416 N.E.2d 95, 107 (Ind. 1981); and the defendant is entitled to notice of the aggravating circumstances the State claims support its death request [I.C. 35-50-2-9(a)].

[12] Schiro's case is not controlled by Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986). The dispositive events in Schiro's case (the acquittals) occurred at the ***guilt phase*** of trial when the jury found Schiro lacked the intent to kill. Simply put, Poland claimed that events at his ***sentencing hearing*** and on appeal prohibited reimposition of the death sentence; Schiro's claims revolve around acquittals at the guilt phase that were dispositive as to penalty. Thus, Schiro's double jeopardy violation stems from guilt phase verdicts which prohibited his case from ***proceeding*** to any sentencer on the question of death. The jury at the guilt phase found that the State did not prove its case; it's decision in that regard is final and immutable.

purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery v. Shore, 439 U.S. 322, 326, 99 S.Ct. 645, 649, 59 L.Ed.2d 552 (1979).

In Ashe, supra, this Court stated:

> [Collateral estoppel] means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit.

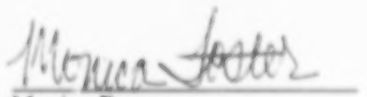
Id. at 443, 90 S.Ct. at 1194.

There can be no doubt the doctrine of collateral estoppel bars the imposition of the death penalty in this case since the jury acquitted Schiro of the "knowing murder" (Count I) at the guilt phase. Obviously, the parties are the same for both the guilt and penalty trials. The State's evidence at the penalty trial before the jury and the judge consisted solely of "incorporating therein by reference" all of the evidence presented at the guilt phase. Tr.R. 129. The State's final argument before the jury consisted solely of references from the guilt phase of trial. Through use of the guilt phase evidence it had presented on Schiro's claimed intent to kill (evidence on Count I), the State urged each sentencer to sentence Schiro to death. Collateral estoppel bars the State from forcing Schiro to run the gauntlet a second and third time.

VI. CONCLUSION

For all of the above argued reasons Schiro respectfully requests this Court to grant the writ and establish a time table for briefing and oral argument and for any and all other relief to which he may be entitled.

Respectfully submitted,



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10. Criminal Law ⇐641.13(7)

Defense counsel is not required to present mitigating evidence where none exists. West's A.I.C. 35-50-2-9.

11. Criminal Law ⇐641.13(7)

Trial counsel was not ineffective for failing to present allegedly mitigating evidence concerning defendant's drug and alcohol use in light of finding that capital murder defendant acted deliberately and had capacity to appreciate wrongfulness of conduct. West's A.I.C. 35-50-2-9; U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐641.13(2)

Failure to submit verdict forms to jury was not ineffective assistance of counsel since jury was accurately instructed on possible verdicts. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐1163(2)

Prejudice, needed to prevail on claim of ineffective assistance of trial counsel, would not be presumed based on counsel's failure to request that jury be sequestered where trial court repeatedly admonished jury not to talk about case with others. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐412.2(2)

Procedural safeguards of *Miranda* apply only to custodial interrogations. U.S.C.A. Const.Amend. 5.

15. Criminal Law ⇐1158(1)

Question of whether custodial interrogation occurred, as needed to invoke defendant's *Miranda* rights, is mixed question of law and fact which should be reviewed under clearly erroneous standard. U.S.C.A. Const.Amends. 5, 6.

16. Criminal Law ⇐519(3)

When reviewing whether defendant was "in custody" at time of confession, Court of Appeals examines the totality of circumstances, especially degree of restraint on defendant's freedom. U.S.C.A. Const.Amend. 5.

17. Criminal Law ⇐517.2(3), 519(1)

Murder defendant was not "in custody" at time of confession to executive director of half-way house where defendant voluntarily approached director and asked to speak with director and defendant was free to leave director's office at any time, even if half-way house was penal facility which confined residents; thus, director was not required to advise defendant of his *Miranda* rights. U.S.C.A. Const.Amend. 5.

18. Criminal Law ⇐412.1(2, 4)

Unlike statements made during custodial interrogation without prior *Miranda* warnings, statements made during noncustodial interrogation without *Miranda* warnings do not enjoy any presumption of coercion. U.S.C.A. Const.Amend. 5.

19. Homicide ⇐358(2)

Factual determination that murder defendant engaged in deceptive behavior at trial by constantly rocking back and forth in jury's presence, used to explain why jury recommended nondeath penalty sentence, was not clear error. 28 U.S.C.A. § 2254(d).

20. Criminal Law ⇐1163(2)

Juror's inadvertent observation of defendant in shackles and manacles outside courtroom is presumptively nonprejudicial unless defendant can affirmatively show that juror was prejudiced by such encounter.

21. Criminal Law ⇐1166.11(3)

Allegations that juror inadvertently observed defendant in shackles was not prejudicial, as needed to prevail on claims for ineffective assistance of counsel and due process violations, since contact between juror and defendant occurred outside courtroom, and was fleeting and inadvertent. U.S.C.A. Const.Amends. 6, 14.

Richard D. Gilroy, Alex R. Voils, Jr., Indianapolis, Ind., for petitioner-appellant.

David A. Arthur, Deputy Atty. Gen., Office of Atty. Gen., Federal Litigation, Indianapolis, Ind., for respondents-appellees.

Before CUMMINGS, WOOD, Jr.,* and EASTERBROOK, Circuit Judges.

* Judge Wood, Jr., assumed senior status on January 16, 1992, which was after oral argument in this case.

CUMMINGS, Circuit Judge.

A broken iron, a shattered vodka bottle, pictures of the lifeless naked body of Laura Luebbehusen covered with blood and bruises, a warning note left for a friend—these trial exhibits relate the nightmarish facts of the case before us.

An Indiana jury convicted Thomas Schiro of the rape and murder of 28-year-old Evansville, Indiana resident, Laura Jane Luebbehusen. For the crime the trial judge sentenced Schiro to death despite the jury's recommendation that Schiro receive a sentence of life imprisonment. Schiro challenged the trial court's imposition of the death penalty in the Indiana Supreme Court, once on direct appeal and two additional times on collateral review. The Indiana Supreme Court affirmed Schiro's conviction and sentence in each case, and the Supreme Court of the United States denied Schiro's petition for writ of certiorari from each of the three Indiana Supreme Court judgments. Schiro sought post-conviction relief from the federal district court for the Northern District of Indiana pursuant to 28 U.S.C. § 2241 and 28 U.S.C. § 2254. In a decision on the merits, Chief District Court Judge Allen Sharp denied Schiro's petition for habeas corpus relief and issued a certificate of probable cause to appeal pursuant to 28 U.S.C. § 2253 and Rule 22(b), Federal Rules of Appellate Procedure. On appeal this Court's jurisdiction stems from 28 U.S.C. § 1291.

Because this case involves the death penalty, and because of the views of three Supreme Court Justices (Brennan, Marshall, and Stevens), we have exercised the meticulous care that such review requires, see *Schiro v. Indiana*, 493 U.S. 910, 913 n. 9, 110 S.Ct. 268-270 n. 9, 107 L.Ed.2d 218 (1989) (Stevens, J., respecting denial of certiorari), and have examined the record in its entirety. After thorough review, and for the reasons set forth below, we affirm the judgment of the district court.

I.

A. Facts

The evidence adduced at trial viewed in the light most favorable to the state's case against the defendant reveals the following facts.[1] On February 4, 1981, Thomas Schiro was serving a three-year suspended sentence for robbery, a class C felony, at the Second Chance Halfway House in Evansville, Indiana. R. 113 (pre-sentence investigation report); R. 889-891 (testimony of Kenneth Hood).[2] That facility houses criminals sent for counseling and treatment rather than incarceration. *Id.* at R. 888-889. While in the work release program, Schiro worked across the street from Laura Luebbehusen's home. R. 1067-1069 (testimony of Robert Wheeler); R. 204-205 (testimony of Kenneth Hood).

At approximately 7:00 p.m. on February 4, Schiro went to an Alcoholics Anonymous meeting. R. 1435 (testimony of Mary Lee). Instead of staying for his 8:00 p.m. meeting, Schiro went to a liquor store and stole an alcoholic beverage. *Id.* at R. 1435, 1437. He took the liquor with him and went to see "quarter movies," which were characterized as hard core pornography. *Id.* at R. 1435, 1437-1439; R. 1743 (testimony of Dr. Frank Osanka). A woman who worked as a cashier at the quarter movie porn shop threw Schiro out when Schiro exposed himself to her. *Id.* at R. 1743. From there Schiro went directly to Ms. Luebbehusen's apartment. R. 1439 (testimony of Mary Lee). The time then was approximately 9:30 p.m. *Id.*

Schiro knocked on Ms. Luebbehusen's door and asked if he could use her phone on the pretext that his car would not start. R. 905-906 (testimony of Kenneth Hood). Ms. Luebbehusen, of course, lost her voice and her ability to tell her story when she lost her life.

1. This Court interprets the facts in the light most favorable to the state's case against the defendant. However, our presentation of the facts, like that of the Indiana Supreme Court, must necessarily rely upon the defendant's account of the events as related to persons who subsequently testified at trial. Ms. Luebbehusen, of course, lost her voice and her ability to tell her story when she lost her life.

2. Unless otherwise specified, all record citations refer to the proceedings before the Honorable Samuel Rosen, who presided at defendant's trial.

Auburn v. Connor, 109 S.Ct. at 1872, we look to the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." More specifically, "deadly force may be used if necessary to prevent escape, ... if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, ... and if, where feasible, some warning has been given." *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985). On the other hand, deadly force is inappropriate when "the suspect poses no immediate threat to the officer and no threat to others." *Id.* Voida justifiably believed that Tom posed an immediate threat to her, and she gave him more than adequate warning. Tom had already inflicted serious physical harm on Voida in two separate encounters. He was rushing at her again. Voida could not have subdued Tom through lesser means, as she did not have her nightstick with her and she feared that reaching for her chemical repellant would expose her weapon to Tom's grasp. Voida fired one shot at Tom which did not hit him, but he insisted on lunging at her again. Voida was justified in concluding that Tom could not be subdued except through gunfire.[11] *Klein v. Ryan*, 847 F.2d 368 (7th Cir.1988) (officers reasonably used deadly force against unarmed and non-threatening forcible burglary suspect to prevent flight).

Finally, because Voida did not violate Tom's constitutional rights, there is no basis for liability against the other defendants either. *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.").

Conclusion

In sum, none of Voida's actions prior to her physical contact with Tom is subject to any scrutiny under the Fourth Amendment. Further, Voida was justified in attempting to handcuff Tom because she then had a reasonable suspicion that he was engaged in criminal activity. In addition, Tom's continued flight from her, even after she had ordered him to stop, had given her probable cause to arrest him. Voida was justified in following him after the initial physical encounter because by this time he had committed at least two crimes. And she was ultimately justified in using deadly force because Tom had already inflicted serious bodily injury on her and threatened to continue doing so. Accordingly, we AFFIRM the district court's grant of summary judgment to the defendants.

Thomas SCHIRO, Petitioner-Appellant,

v.

Richard CLARK, Superintendent, and Indiana Attorney General, Respondents-Appellees.

No. 91-1509.

United States Court of Appeals, Seventh Circuit.

Argued Oct. 15, 1991

Decided May 8, 1992

Defendant's murder conviction and death sentence were affirmed on appeal by the Indiana Supreme Court, 451 N.E.2d 1047. Defendant petitioned for writ of habeas corpus. The United States District Court for the Northern District of Indiana, Allen Sharp, Chief Judge, 754 F.Supp. 646, denied petition and issued certificate of probable cause to appeal. The Court of Appeals, Cummings, Circuit Judge, assumed jurisdiction and held that: (1) Indiana death penalty statute which required trial judge to impose sentence after recommendation by jury was not unconstitutional; (2) imposing death penalty did not violate double jeopardy prohibitions; (3) trial counsel was not shown to have been ineffective; (4) confession to executive director of half-way house without *Miranda* warnings was admissible; and (5) no prejudice resulted from inadvertent out-of-court contact between juror and defendant while he was in manacles and shackles.

Affirmed.

1. Criminal Law ⇐749

Under Indiana law concerning death penalty, trial judge determines defendant's sentence after jury issues its sentencing recommendation. West's A.I.C. 35-50-2-9.

2. Criminal Law ⇐1206.1(2)

Criteria for determining whether state has appropriately limited discretion in imposing death penalty are whether statutory scheme furnishes clear and objective standards, specific and detailed guidance, opportunity for a rational review of process for imposing death sentence, and whether sentencing scheme narrows class of persons eligible for death penalty.

3. Criminal Law ⇐1206.1(2)

Indiana death penalty statute was not arbitrary or discriminatory, even though statute required judicial sentencing after advisory recommendation from jury, where statute's list of aggravating and mitigating factors provided fixed, objective, and uniform discretionary constraints, and judge was required to make written findings regarding existence of aggravating circumstances and that aggravating factors outweighed mitigating factors. West's A.I.C. 35-50-2-9; I.C. 35-4.1-4-3 (1982 Ed.).

4. Criminal Law ⇐1206.1(2)

Indiana death penalty statute, which permitted trial judge to impose death penalty despite jury recommendation to contrary, was not unconstitutional. West's A.I.C. 35-42-1-1(2); U.S.C.A. Const. Amends. 4, 5, 8; West's A.I.C. Const. Art. 1, §§ 12, 14, 16.

5. Federal Courts ⇐404

In order to assess effect of jury's findings in capital murder case, Court of Appeals looks to state law.

6. Double Jeopardy ⇐29, 103

Under Indiana law, jury's finding of felony-murder did not amount to acquittal on intentional murder charge and, thus, double jeopardy did not prohibit imposition of death penalty. U.S.C.A. Const.Amends. 5, 14; West's A.I.C. 35-50-2-9.

7. Double Jeopardy ⇐29

Imposing death penalty after contrary sentencing recommendation by jury did not violate the double jeopardy prohibition since no sentence could be entered under Indiana law except by trial judge; jury's sentencing recommendation was not final judgment and could not act as acquittal. U.S.C.A. Const.Amends. 5, 14; West's A.I.C. 35-50-2-9.

8. Criminal Law ⇐641.13(1)

In order to prove that defendant received ineffective assistance of counsel, defendant must show that counsel's performance fell below objective standard of reasonableness and that but for counsel's unreasonable conduct, result of proceeding would have been different. U.S.C.A. Const.Amend. 6.

9. Homicide ⇐357(4)

Claim that murder defendant was sexual sadist and that his extensive viewing of rape pornography and snuff films rendered him unable to distinguish right from wrong did not constitute mitigating circumstance under Indiana death penalty law; "mental disease" or "defect" under statute did not include abnormality manifested only by repeated criminal or otherwise antisocial conduct. West's A.I.C. 35-50-2-9.

11. Despite these facts, the plaintiff argues that Tom had not committed any crime at all, and that Tom posed no threat of serious bodily injury because Voida initiated the contacts while he was running away. Appellant's Br. at 29. Here again the plaintiff focuses on the wrong time period. When Voida made the decision to use deadly force, Tom was not fleeing. He was actively and violently resisting arrest.

relief), that the trial court erred in finding that certain allegations were *res judicata* or waived, that the jury's guilty verdict for murder while committing a rape established that the defendant lacked the requisite mental state required for imposition of the death penalty, and that these alleged errors, taken together, constituted prejudice warranting reversal. *Schiro v. State*, 533 N.E.2d 1201 (1989) ("*Schiro III*"), certiorari denied, *Schiro v. Indiana*, 493 U.S. 910, 110 S.Ct. 268, 107 L.Ed.2d 218.

The case was then fully and independently reviewed on habeas corpus by Chief Judge Sharp of the Northern District of Indiana, who issued a final judgment denying habeas relief, 754 F.Supp. 646 (N.D.Ind. 1990), and also issued a certificate of probable cause to appeal. This Court has assumed jurisdiction under 28 U.S.C. § 1291.

II.

A. Judicial Imposition of the Death Penalty

[1] Under Indiana law, a trial judge determines a defendant's sentence after the jury issues its sentencing recommendation. Indiana Code § 35-50-2-9 (Burns 1979) states that "[t]he court shall make the final determination of the sentence, after considering the jury's recommendation." The Indiana Code further states that "[t]he court is not bound by the jury's recommendation." On appeal in this Court, Schiro argues that the Indiana Death Penalty statute violates constitutional guarantees provided by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

The constitutional challenge raised by petitioner would indeed be a significant one if the Supreme Court had not largely resolved the matter in *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). In *Spaziano*, the Court held that a judge may impose the death penalty despite a jury's recommendation to the contrary, since defendants have no constitutional right to jury sentencing in capital cases. Subsequent Supreme Court decisions have confirmed that holding. "The decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury." *Clemons v. Mississippi*, 494 U.S. 738, 745-746, 110 S.Ct. 1441, 1446-1447, 108 L.Ed.2d 725 (1990) (quoting *Cabana v. Bullock*, 474 U.S. 376, 385, 106 S.Ct. 689, 696, 88 L.Ed.2d 704 (1986)). Schiro concedes that the constitution does not require jury sentencing in capital cases. He also concedes that under *Spaziano* a judge may impose the death penalty despite a jury's recommendation to the contrary. However, he attempts to distinguish *Spaziano* on the basis that the "*Tedder* standard"[6] was employed in *Spaziano* but not in his case. According to Schiro, the *Tedder* standard is constitutionally necessary under *Spaziano*. Thus he contends that the Indiana Supreme Court's failure to adopt and employ the *Tedder* standard in his case renders his sentence unconstitutional.

This Court is not persuaded that *Spaziano* requires or that reasoning commends such a holding. Under *Spaziano*, a reviewing court's responsibility "is not to second-guess the deference accorded to the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory." *Id.*, 468 U.S. at 465, 104 S.Ct. at 3165. See also *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Review designed to invalidate arbitrary or discriminatory sentences not only provides a more direct link to values of fairness and consistency, but also provides a more judicially manageable standard than reviewing the level of judicial deference accorded to the jury. Short of mind-reading or the submission of evidence regarding a sentencing judge's thought processes, this Court knows of no way to distinguish a case in which a trial judge gave serious consideration to the jury's sentencing recommendation before rejecting it, from a case in which the trial judge did not give serious consideration to the jury's recommendation before rejecting it. In short we cannot discern a practicable standard for reviewing the amount of deference the trial judge accorded to the jury's recommendation.

[2, 3] This Court, of course, seeks to ensure that the application of the death penalty statute is neither arbitrary nor discriminatory. *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), sets forth three criteria to determine whether a state has appropriately limited a sentencer's discretion. The statutory scheme must furnish clear and objective standards, specific and detailed guidance, and an opportunity for rational review of the process for imposing the death sentence. *Id.* at 427, 100 S.Ct. at 1764 (Stewart, J., plurality opinion); *Stringer v. Black*, — U.S. —, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (explicitly applying the *Godfrey* principle to a "weighing" state). Furthermore, a sentencing scheme must narrow the class of persons eligible for the death penalty. *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Indiana's list of aggravating and mitigating factors provides fixed, objective and uniform discretionary constraints to guide death penalty sentencing decisions. Although Indiana vests sentencing authority in a judge rather than a jury, the judge's discretion is limited by the same factors which limit the jury's sentencing discretion. Before a judge can impose the death sentence she must find the existence of one of nine aggravating circumstances beyond a reasonable doubt. Ind.Code § 35-50-2-9 (Burns 1979). In addition, the trial judge must find that any aggravating factors outweigh any mitigating factors. *Id.* Not only has Indiana enumerated clear, objective and specific standards for imposing the death penalty, but it has also required the sentencing judge to make written findings with respect to those factors in order to facilitate appellate review. Ind.Code § 35-4.1-4-3 (Burns 1979). As a result of these safeguards, the Indiana death penalty statute will not lead to arbitrary or discriminatory results generally or in Schiro's case. There is no one set way for a state to set up its capital sentencing scheme. *Spaziano*, 468 U.S. at 464, 104 S.Ct. at 3164. In light of studies that jury sentencing leads to racial discrepancies in capital sentencing, *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), a state might rationally conclude that judicial sentencing could prove to be a more desirable alternative. Regardless of its rationale, a state may constitutionally establish pure judicial sentencing in capital cases or it may permit judicial sentencing upon a non-binding, advisory recommendation from a jury, as Indiana has chosen to do.

[4] Schiro does not contend that imposition of the death sentence in his case was either arbitrary or discriminatory. His crime was not only heinous but deliberate and calculated. As Judge Rosen noted in his pronouncement of sentence, this crime involved cruel and sadistic acts; yet Schiro wore gloves while committing those acts so as not to leave fingerprints. He makes no claim that he is innocent of the crimes charged, nor could he in light of the overwhelming testimony and physical evidence. In addition, extensive evidence revealed that he committed numerous other brutal and sadistic acts which cast doubt on his character and his ability to be rehabilitated.

Some may contend that "a judge should not have the awesome power to reject a jury recommendation of life." *Schiro v. Indiana*, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (Marshall, J., dissenting from denial of certiorari). But under the Supreme Court's jurisprudence, which is binding on this Court, a state may elect to give its trial judges such power. While a judge's power may exceed constitutional boundaries if her judgments are arbitrary or discriminatory, what constitutes arbitrary or discriminatory sentencing need not be defined in relation to a standard of judicial deference to the jury. Because the Supreme Court established only that *Tedder* was a "significant safeguard," *Spaziano*, 468 U.S. at 465, 104 S.Ct. at 3165, not that it was an essential one, we reject

6. Under the "*Tedder* standard," *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975), a trial judge may sentence a defendant to death despite a jury recommendation to the contrary if the evidence favoring the death penalty is "so clear and convincing that no reasonable person could differ." Although the Indiana Supreme Court had not adopted the *Tedder* standard at the time of Schiro's case, that court subsequently adopted it in *Chavez v. State*, 534 N.E.2d 731 (1989).

R. 1435 (testimony of Mary Lee). After he pretended to use the phone, Schiro asked to use the bathroom. R. 1425-1426 (testimony of Mary Lee). When he came out of the bathroom Schiro was exposed and Luebbehusen became frightened. *Id.* at R. 1426. In an attempt to calm her, Schiro told Luebbehusen that he did not want to hurt her, that he was gay, and that he was just trying to win a bet that he could "get it on" with a woman. *Id.* Schiro went through the small apartment looking for drugs and money. *Id.* at R. 1746. He came back with drugs and two dildos. *Id.* Schiro told Luebbehusen to drink some liquor and take drugs as he did. *Id.* at R. 1745-1746, 1748. Schiro also told Luebbehusen to insert a dildo into his anus but he found that very painful. *Id.* at R. 1746-1747. Luebbehusen told Schiro that she was gay, that she had been raped as a child, that she had never had sex before, and that she did not want to have sex. *Id.* at R. 1745, 1747. Schiro then raped her. *Id.*[3] When Schiro left the room, Luebbehusen tried to leave but Schiro pulled her back in the house, dragged her by her hair, told her not to try to leave again and raped her a second time. *Id.* at R. 1749. When the liquor ran out, Schiro took her with him to get some more. R. 1441 (testimony of Mary Lee). When they returned to Luebbehusen's home Schiro raped her a third time and then passed out on the couch. R. 1428 (testimony of Mary Lee), R. 1738, 1751 (testimony of Dr. Frank Osanka). When Schiro woke up, Luebbehusen was dressed and headed out the door. R. 1428 (testimony of Mary Lee). Luebbehusen told Schiro that she would not turn him in and was just going to find her girlfriend. *Id.* at R. 1430. Schiro wouldn't let her leave and Schiro believed that she then fell asleep. R. 1750 (testimony of Dr. Frank Osanka). At that time Schiro decided that he had to kill her so that she couldn't report the rapes. R. 1428-1429 (testimony of Mary Lee). Schiro hit her on the head with a vodka bottle until it shattered. *Id.* at R. 1428, 1429, 1430. Luebbehusen was fighting Schiro. *Id.* He picked up an iron and beat her with it; she was fighting him. She was still fighting him when he strangled her to death. *Id.*, R. 647-648 (testimony of Dr. Albert Venables). He then dragged her body from the bedroom to the living room where he performed vaginal and anal intercourse on the corpse and chewed on several parts of her body. R. 44 (psychiatric evaluation By Dr. Bernard Woods), R. 1429 (testimony of Mary Lee), R. 1736, 1751 (testimony of Dr. Frank Osanka).

When Schiro left Luebbehusen's house he took one of the plastic dildos with him and threw it in the trash behind a tavern in Vincennes. R. 1431 (testimony of Mary Lee). Schiro also took gloves that he had been wearing so as not to leave any fingerprints. *Id.* at R. 1432, 1433. He gave the gloves to his girlfriend Mary Lee who washed them, cut them in little pieces and threw them away.[4]

The following morning, February 5, 1981, Luebbehusen's roommate Darlene Hooper and her ex-husband Michael Hooper discovered Luebbehusen's body near the doorway. R. 439 (testimony of Michael Hooper). Luebbehusen's legs were spread apart and her slacks were pulled down around her ankles. *Id.* at R. 442. She had many bruises and cuts on her body, which included tooth marks, and a vaginal laceration. R. 653, 649, 657, 661-662 (testimony of Dr. Albert Venables). Blood covered the walls and floor, and parts of the house were in disarray. R. 442 (testimony of Michael Hooper), R. 543-547 (testimony of Dennis Buckel). Michael Hooper called the police, who recovered a shattered vodka bottle and a broken iron in addition to other evidence. R. 439 (testimony of Michael Hooper), R. 479, 480, 552-564 (testimony of Dennis Buckel).

3. We regret the Indiana Supreme Court's statement that according to Mary Lee, Schiro "told Luebbehusen he would make love to her." As far as we can tell, Mary Lee's testimony never used or suggested the term "made love," with its consensual connotations. Lee said that Schiro said "he did it to [Luebbehusen]," and that he raped her. R. 1426, 1427.

4. Lee later turned the pieces over to detectives. R. 1433 (testimony of Mary Lee), R. 808 (testimony of Donald Erk).

A few days later, Luebbehusen's automobile was discovered approximately one block away from the Second Chance Halfway House. R. 939-940 (testimony of Keith Shiver).[5]

B. Procedural History

Because the judicial system has considered Schiro's case for over ten years, this section briefly addresses the major procedural history of Schiro's case. On September 12, 1981, in the Brown Circuit Court, in Nashville, Indiana, petitioner Thomas Nicholas Schiro was convicted of murder while committing or attempting to commit rape, Ind.Code § 35-42-1-1(2) (Burns 1979). On October 2, 1981, Judge Samuel R. Rosen pronounced a sentence of death despite a jury recommendation to the contrary. Because Judge Rosen imposed the death penalty, the case was automatically appealed to the Indiana Supreme Court. While the case was pending on direct review, the Indiana Supreme Court granted the state's petition to remand the case to Judge Rosen to make written findings of fact regarding aggravating and mitigating circumstances. Judge Rosen affirmed that at sentencing the state had proved the existence of one aggravating circumstance beyond a reasonable doubt—that "the defendant committed the murder by intentionally killing the victim while committing or attempting to commit * * * rape." Trial Court's Nunc Pro Tunc Pronouncement of Sentencing of February 23, 1983. Judge Rosen found no mitigating factors. *Id.* On direct appeal to the Indiana Supreme Court, Schiro raised numerous issues. He claimed that the Indiana death penalty statute violated the Indiana and United States Constitutions, the trial court erred in imposing the death penalty, the warrant for the search of his room was improperly issued, his confessions were unlawfully admitted into evidence, a letter he wrote regarding his prior criminal acts was improperly excluded from evidence, the jury was not supplied with proper verdict forms, and the presentence report contained improper information. The Indiana Supreme Court rejected each of Schiro's arguments, upheld his conviction and sentence, and remanded the case to the trial court for determination of the date of execution of the death sentence. *Schiro v. State*, 451 N.E.2d 1047 (1983) ("*Schiro I*"). At that time, Schiro sought review of his death penalty conviction in the Supreme Court of the United States but it denied his petition for writ of certiorari. *Schiro v. Indiana*, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699.

Schiro petitioned for post-conviction relief in the Brown Circuit Court on May 11, 1984. His petition was heard by the Honorable James M. Dixon acting as a special judge. After a hearing, Judge Dixon denied the petition. The Indiana Supreme Court reviewed Schiro's post-conviction claims that the trial judge who sentenced him was biased and improperly considered evidence of Schiro's behavior at trial, and that he was denied effective assistance of counsel. Again, the Indiana Supreme Court affirmed the judgment of the trial court. *Schiro v. State*, 479 N.E.2d 556 (1985) ("*Schiro II*"), and the Supreme Court of the United States again denied Schiro's petition for writ of certiorari to vacate the death sentence. *Schiro v. Indiana*, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (1986).

Schiro filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Indiana. Chief Judge Allen Sharp remanded the case to the Indiana courts in order for Schiro to exhaust all available state remedies. He then filed a second petition for post-conviction relief in the Indiana Circuit Court, which petition was reviewed and denied by Special Judge John Baker of Bloomington, Indiana. The Indiana Supreme Court reviewed Schiro's case for the third time and again affirmed. It rejected Schiro's contentions that he was denied effective assistance of counsel at trial (on direct appeal and on his first petition for post-conviction

5. A police search of the defendant's room uncovered additional physical evidence of the crime. R. 735-747 (testimony of Donald Erk).

A-4

A-3

Schiro's assertion that the sentencing scheme applied in his case can be meaningfully distinguished from that at issue in *Spaziano.*

B. Double Jeopardy

Schiro also contends that imposition of the death penalty in his case violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment. *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). That Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The prohibition against Double Jeopardy only applies "if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States,* 468 U.S. 317, 325, 104 S.Ct. 3081, 3086, 82 L.Ed.2d 242 (1984). Thus Schiro's argument hinges on his claim that he was acquitted of intentional murder. Specifically, Schiro claims that either the jury's conviction for murder while committing or attempting to commit a rape constituted an acquittal on the murder charge, or that the jury's sentencing recommendation acted as an acquittal. Each of these assertions will be addressed in turn.

[5, 6] At trial, the jury was offered potential verdicts of murder, murder while committing or attempting to commit rape, and murder while committing or attempting to commit deviate sexual conduct. R. 108. The jury found Schiro guilty of felony-murder, murder during the course of a rape, and left blank spaces beside the other two counts on the jury form. R. 108. The felony-murder charge does not require the prosecution to prove that Schiro killed Luebbehusen intentionally. Schiro argues that the jury's conviction for felony-murder acted as an acquittal on the intentional murder charge and that the jury necessarily found that Schiro did not murder Luebbehusen intentionally. In order to assess the effect of the jury's findings, this Court looks to state law. *United States ex rel. Young v. Lane,* 768 F.2d 834, 841 (7th Cir.1985) ("states possess substantial latitude to decide *which* decisions in the criminal process are to be treated as 'acquittals' "), certiorari denied, *Young v. Lane,* 474 U.S. 951, 106 S.Ct. 317, 88 L.Ed.2d 300. The Indiana Supreme Court squarely rejected Schiro's argument that he was acquitted of intentional murder. *Schiro v. State,* 533 N.E.2d 1201 (Ind.1989). That Court stated that "[felony murder] is not an included offense of [murder] and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider." *Id.* Since the jury's verdict did not amount to an acquittal under state law, the jury did not previously determine that Schiro did not intentionally murder Luebbehusen. Therefore this double jeopardy argument must fail.[7]

[7] Next, we address Schiro's contention that the jury's sentencing recommendation constituted a final judgment of acquittal. Schiro cites *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), to support his proposition that the Indiana jury's advisory sentencing recommendation operated as an acquittal. Once again, the Supreme Court's holding in *Spaziano* invalidates Schiro's claim. According to *Spaziano, Bullington* does not apply to cases in which a judge imposes the death penalty against the jury's advisory recommendation. *Spaziano,* 468 U.S. at 453, 104 S.Ct. at 3158.

7. The collateral estoppel argument raised, not by Schiro, but by Justice Stevens' opinion respecting denial of certiorari in this case, does not change our understanding. 493 U.S. 910, 110 S.Ct. 268, 270, 107 L.Ed.2d 218. *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), bars relitigation where an issue of ultimate fact has been previously determined by a valid and final judgment. However, the defendant must show that the jury's verdict actually and necessarily determined the issue he seeks to foreclose. *United States v. Patterson,* 827 F.2d 184 (7th Cir.1987) (per curiam). Here Schiro's conviction for murder/rape did not act as an acquittal with respect to the pure murder charge as a matter of state law. Thus the jury's verdict did not determine the issue of intentionality.

Unlike the binding sentencing recommendations issued by Missouri juries at the time of *Bullington,* Indiana law leaves no doubt that its juries' sentencing recommendations are only recommendations. The assumption that "the jury's constitutional role in determining sentence was equivalent to its role in determining guilt or innocence" is no longer tenable in light of *Spaziano. Cabana v. Bullock,* 474 U.S. 376, 388 n. 4, 106 S.Ct. 689, 697, n. 4, overruled on different grounds, *Pope v. Illinois,* 481 U.S. 497, 504 n. 7, 107 S.Ct. 1918, n. 7, 95 L.Ed.2d 439 (1987). Schiro had no legitimate expectation that the jury's recommendation would be his final sentence. Cf. *United States v. Di Francesco,* 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) (holding that modification of a sentence is not violative of the Double Jeopardy Clause when a defendant has no legitimate expectation of finality in the original sentence). No final conviction could be entered until the sentence was entered. And under Indiana law, no sentence could be entered, except by the trial judge—the only person given authority to determine the defendant's sentence. Because the jury's sentencing recommendation was not a final judgment, it could not act as an acquittal. Judge Rosen declared that the state had proved the existence of an aggravating factor beyond a reasonable doubt[8] and the jury never acquitted Schiro on the element of intentionality. Thus we reject Schiro's double jeopardy claim.

C. Ineffective Assistance of Counsel

[8] Schiro also contends that he was denied effective assistance of counsel. He bases his contention on four alleged failures of trial counsel, namely, (1) counsel failed to present evidence of mitigating circumstances, (2) counsel failed to adequately prepare or investigate the case, (3) counsel failed to submit guilty but mentally ill verdict forms to the jury and (4) counsel failed to request that the jury be sequestered or adequately admonished. In order to prove that he received ineffective assistance of counsel, Schiro must show both that counsel's performance fell below an objective standard of reasonableness and that but for counsel's unreasonable conduct, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 700, 104 S.Ct. 2052, 2071, 80 L.Ed.2d 674 (1984), rehearing denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864; *United States v. Lane,* 819 F.2d 798, 802 (7th Cir.1987). Although this standard applies to counsel's conduct as a whole, for clarity this Court will examine Schiro's first and primary contention separately.

D. Mitigating Circumstances

Schiro alleges that the trial judge's finding of no mitigating circumstances was due to his trial counsel's failure to present any evidence of mitigating circumstances to the court. As an initial matter, this Court notes that this assertion is patently incorrect. His counsel did attempt to prove the existence of a mitigating factor, he strenuously argued that Schiro's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication"—one of the seven mitigating factors provided by Indiana's death penalty statute. Indiana Code § 35-50-2-9.

[9] Judge Rosen's denial of the existence of any mitigating factors was not because Schiro's counsel did not raise any argument for mitigation, but because the judge found that such arguments did not justify mitigation. At trial, Schiro argued that he was a sexual sadist and that his extensive viewing of rape pornography and snuff films rendered him unable to distinguish right from wrong. In support of this assertion, his expert witness, Edward Don-

8. The Indiana Supreme Court held that "[t]he [trial] court, as prescribed by the death penalty statute, found the existence of an aggravating circumstance proved beyond a reasonable doubt." *Schiro v. State,* 479 N.E.2d 556. Whether the trial court appropriately determined the existence of an aggravating factor under Indiana law is a question of state law which Schiro has not asked this Court to review and which is not within the ambit of habeas review.

nerstein, testified that after a short exposure to aggressive pornography "non-rapist populations * * * begin to endorse myths about rape." R. 1549 (testimony of Edward Donnerstein). "They begin to say that women enjoy being raped and they begin to say that using force in sexual encounters is okay. Sixty percent of the subjects will also indicate that if not caught they would commit the rape themselves." *Id.* In addition to Mr. Donnerstein's testimony that pornography generally encourages men to commit acts of violence against women, one of defendant's other expert witnesses testified that Schiro's viewing of pornography actually encouraged him to commit the acts of violence at issue in this case. Dr. Frank Osanka testified that Schiro viewed pornographic films from age six, and throughout his childhood and his adulthood, that led him to be aroused by women's pain and taught him techniques of rape. R. 1713, 1727 (testimony of Dr. Frank Osanka, listing at least two specific films which encouraged Schiro's criminal activity). A written autobiographical statement of petitioner's which was read to the jury is perhaps most telling: "I can remember when I get horny from looking at girly books and watching girly shows that I would want to go rape somebody. Every time I would jack off before I come I would be thinking of rape and the women I had raped and remembering how exciting it was. The pain on their faces. The thrill, the excitement." R. 1368–1369 (Schiro's autobiographical statement). At closing argument Schiro's counsel relied on Dr. Osanka and Mr. Donnerstein to support his claim that "the pattern is clear, premature exposure to pornography and continual use with more violent forms created one thing, created a person who no longer distinguishes between violence and rape, or violence and sex."

Schiro contended either that pornography is a mitigating factor akin to intoxication or mental disease or defect which rendered him unable to appreciate the criminality of his conduct, or that pornography caused him to suffer from sexual sadism, which in turn rendered him unable to appreciate the wrongfulness of his conduct. After hearing such evidence, Judge Rosen rejected the arguments on the basis that defendant was sadistic, not psychotic or insane, and on the basis that he was able to appreciate the wrongfulness of his conduct. Clearly, Indiana may determine that sadism (or voyeurism, exhibitionism, and necrophilia as also claimed) does not amount to a mental disease or defect which warrants reduced punishment. This is particularly so because the primary manifestation of these conditions is criminal, anti-social conduct and under Indiana law "[t]he terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." R. 405, *Richardson v. State,* 170 Ind.App. 212, 351 N.E.2d 904 (1976). Moreover, the trial judge could permissibly find from the evidence both that Schiro understood the criminality of his conduct and that pornography is not a mental disease or defect which would permit a finding of insanity.

The troubling aspect of Schiro's defense is that his argument that pornography reduced his capacity to understand the criminality of his conduct, if successful, would not only excuse him from imposition of the death penalty but further excuse him for his criminal conduct altogether on the basis that he was not guilty by reason of insanity. Under Schiro's theory pornography would constitute a legal excuse to violence against women. This Court previously addressed the issue of pornography in *American Booksellers Ass'n, Inc. v. Hudnut,* 771 F.2d 323 (1985), affirmed, 475 U.S. 1001, 106 S.Ct. 1172, 89 L.Ed.2d 291 (1986). There we accepted the premise of anti-pornography legislation that pornographic depictions of the subordination of women perpetuate the subordination of women and violence against women.[9] However, we held that under the First Amendment pornography may not be banned because its harmful effects depend on mental intermediation. 771 F.2d at 329. It would be impossible to hold both that pornography does not directly cause violence but

9. See Catharine A. MacKinnon, *Towards a Feminist Theory of the State,* 195–214 (1989).

criminal actors do, and that criminal actors do not cause violence, pornography does. The result would be to tell Indiana that it can neither ban pornography nor hold criminally responsible persons who are encouraged to commit violent acts because of pornography! The recognition in *Hudnut* that pornography leads to violence against women does not require Indiana to establish a defense of insanity by pornography.[10] In *Hudnut* we said that pornographers may be liable for rape just as the instigator of a riot could be held liable for inciting that riot. 771 F.2d at 333. *Hudnut* does not suggest that the rioter or the rapist is not also culpable for his own conduct.

[10, 11] As for the other mitigating factors, defense counsel is not required to present mitigating evidence where none exists. Cf. *Smith v. Dugger,* 840 F.2d 787, 795 (11th Cir.1988), certiorari denied, 494 U.S. 1047, 110 S.Ct. 1511, 108 L.Ed.2d 647 (1990). If Schiro alleges prejudice from his trial counsel's failure to present mitigating evidence at trial, as he does here, he must offer some piece of mitigating evidence that should have been presented to the trial court but wasn't. He offers none, and we fail to see what evidence of mitigation might have been offered.[11] Schiro did present evidence relating to his drug and alcohol use, but the trial court found that evidence insignificant since Schiro acted deliberately and had the capacity to appreciate the wrongfulness of his conduct. As for his criminal history, Schiro's record is replete with violent crimes. R. 113. His own expert believed that Schiro had committed some nineteen to twenty-four rapes. R. 1721 (testimony of Dr. Frank Osanka). Schiro's girlfriend testified regarding Schiro's numerous brutal, sadistic and life-threatening assaults on herself and her son. R. 1181, 1446, 1461, 1463, 1465, 1467, 1472. Linda Summorford testified that Schiro broke into her home, held a gun to her son's head and raped her in front of her six-year-old daughter who has cerebral palsy. R. 1830–1841. The jury's verdict settled any question as to whether the victim consented to sexual intercourse, see *O'Connor v. State,* 529 N.E.2d 331 (Ind. 1988), and she certainly did not consent to be murdered. Schiro's participation was as a principal and that participation was far from minor. Moreover, Schiro did not act under the domination of another person. Because Schiro has not shown any evidence of mitigating factors that his trial counsel should have offered but unreasonably and prejudicially failed to offer, his ineffective assistance claim on this point is devoid of merit.

[12, 13] Schiro's other ineffective assistance claims are equally devoid of merit. He has not shown and the record does not reveal evidence that his trial counsel failed to prepare Schiro's case adequately. Counsel's failure to submit certain verdict forms to the jury was not prejudicial since the jury was accurately instructed on those possible verdicts. Finally, we do not presume prejudice where the defendant's counsel has failed to request that the jury be sequestered. *Bell v. Duckworth,* 861 F.2d 169, 170–171 (7th Cir.1988), certiorari denied, 489 U.S. 1088, 109 S.Ct. 1552, 103 L.Ed.2d 855 (1989). Moreover, in contrast to Schiro's assertion, Judge Rosen repeatedly admonished the jury not to talk about the case with others. R. 579, 702–703, 934–936, 1064–1065, 1169–1170, 1288–1290, 1497–1498, 1660, 1791–1793.

Petitioner has not shown that his counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by any such conduct. He has

10. Under repeated questioning by Judge Rosen as to the relevance of his testimony, Schiro's own witness conceded that even though the viewing of pornography is relevant to show whether Schiro sees rape as a violent crime, viewing pornography does not have "any relationship to competency or legal sanity." R.1560–1561 (testimony of Mr. Donnerstein). Indiana can decide, and appears to have decided in this case, that a defendant cannot excuse his conduct by showing that in spite of his awareness of a person's non-consent to sexual relations, he believed that he had a right of sexual access or dominion over that person.

11. Indiana Code § 35-50-2-9(c) (Burns 1979) sets forth mitigating circumstances appropriate for consideration.

him in manacles and shackles. As a result he claims to have been denied both effective assistance of counsel and due process of law. A juror's inadvertent observation of a defendant in shackles and manacles outside the courtroom is presumptively non-prejudicial unless the defendant can affirmatively show that jurors were prejudiced by such an encounter. *United States v. Jones*, 696 F.2d 479 (7th Cir.1982), certiorari denied, 462 U.S. 1106, 103 S.Ct. 2455, 77 L.Ed.2d 1333 (1983). The state has a legitimate interest in seeing that the defendant once outside the courtroom remains in custody and does not flee. *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).

[21] The Indiana Supreme Court has distinguished between cases in which jurors see a prisoner in shackles while being transported to and from court, *Sweet v. State*, 486 N.E.2d 924, 929 (Ind.1986), and cases in which jurors see a shackled prisoner during court proceedings, *Walker v. State*, 274 Ind. 224, 410 N.E.2d 1190, 1193-1194 (1980). That court has held that reasonable jurors can expect a criminal defendant to be in manacles and shackles during breaks and while being transported. *Jenkins v. State*, 492 N.E.2d 666, 669 (Ind. 1986). Accordingly, the Indiana Supreme Court determined that Schiro's allegation did not demonstrate prejudice. *Schiro III*, 533 N.E.2d 1201. Where the contact between the jury and the defendant was both fleeting and inadvertent, we agree that Schiro has not met his burden of showing prejudice.

III.

This Court has considered each of Schiro's arguments and for the foregoing reasons his constitutional claims are rejected. The judgment of the district court is affirmed.

* Case No. 91-1908 was submitted and decided on the briefs.

UNITED STATES of America, Plaintiff-Appellee,

v.

Ellis BURRELL, Billy J. Henry, Jon P. Hammonds, William D. Hatch, John Jones, and Steven E. Williams, Defendants-Appellants.

Nos. 91-1908,* 91-2089, 91-2090, 91-2091, 91-2113 and 91-2114.

United States Court of Appeals, Seventh Circuit.

Argued Jan. 16, 1992.

Decided May 11, 1992.

Rehearing Denied June 10, 1992 in Nos. 91-2089 and 91-2091.

Defendants were convicted of various narcotics and firearm offenses by the United States District Court for the Central District of Illinois, Harold Albert Baker, Chief Judge, and they appealed. The Court of Appeals, Bauer, Chief Judge, held that: (1) allowing jurors to handle firearms used by defendants prior to closing arguments was not abuse of discretion; (2) finding that defendants were knowing participants in narcotics conspiracy, and not mere paid bodyguards, was sufficiently supported by evidence; and (3) defendants' base offense levels were properly calculated based on total amount of marijuana that coconspirators had agreed to purchase.

Affirmed.

1. Criminal Law ⇐663, 858(1)

District court has considerable discretion in handling of exhibits during trial, as well as during jury deliberations.

2. Criminal Law ⇐1153(1)

Court of Appeals reviews district court's handling of exhibits for clear abuse of discretion.

3. Criminal Law ⇐663

Allowing jury to handle firearms used by alleged narcotics conspirators prior to closing arguments was not abuse of discretion, as constituting an improper appeal to jurors' passion and prejudice, where all of the weapons had been admitted into evidence.

4. Criminal Law ⇐663

Allowing jurors to handle, in group, the firearms used by alleged narcotics conspirators did not improperly bolster government's case, on theory that jurors, when confronted with weapons as group, were all but forced to conclude that defendants were part of one conspiracy.

5. Conspiracy ⇐45

Conspirator's declarations may be evidence that defendant joined and participated in conspiracy.

6. Criminal Law ⇐629(1)

Trial court need not give proposed instruction if essential points are covered by instruction given.

7. Criminal Law ⇐808(1)

District court has substantial discretion with respect to specific wording of jury instructions.

8. Constitutional Law ⇐270(2)
Criminal Law ⇐1299, 1306

Defendant had no constitutionally protected right to downward departure from authorized sentence, based on substantial assistance that he allegedly provided to government, and could not complain of prosecutor's alleged bad faith in failing to move for reduction. U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.App.

9. Criminal Law ⇐1306

Decision to move for reduction in authorized sentence based on defendant's substantial assistance to government is one committed to discretion of prosecutor, and is not reviewable for arbitrariness or bad faith. U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.App.

10. Criminal Law ⇐274(3)

Defendant must be allowed to withdraw plea, where prosecutor promises to file motion for downward departure from authorized sentence and fails to honor that promise.

11. Criminal Law ⇐273.1(2), 274(3)

Plea agreement between government and alleged narcotics conspirator, whereby government agreed, in its sole discretion, to move for downward departure from authorized sentence if defendant provided substantial assistance, did not obligate prosecutor to move for departure, and did not permit defendant to withdraw guilty plea for prosecutor's alleged bad faith in failing to seek departure after he allegedly assisted government in obtaining conviction of coconspirator. U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.App.

12. Criminal Law ⇐1158(4)

Factual findings made by trial court at suppression hearing will be upheld on appeal, absent clear error.

13. Arrest ⇐63.4(2)

"Probable cause" for arrest exists if, at moment arrest was made, facts and circumstances within officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant prudent person in believing that offense had been committed. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

14. Arrest ⇐63.4(2, 3)

"Probable cause" for arrest requires more than bare suspicion, but need not be based on evidence sufficient to support conviction, nor even on showing that officer's belief is more likely true than false. U.S.C.A. Const.Amend. 4.

15. Arrest ⇐63.4(1)

Constitutional validity of warrantless arrest depends upon probable cause to effectuate arrest under totality of circumstances. U.S.C.A. Const.Amend. 4.

16. Arrest ⇐63.4(2)

Relevant inquiry, in deciding whether police officers had "probable cause" to arrest, is not whether officers' specific conduct is innocent or guilty, but on level of

therefore failed to meet either of his burdens.

E. Admissibility of Confessions

Schiro admitted killing Luebbehusen to Kenneth Hood, Second Chance Halfway House Executive Director. At trial, Hood testified regarding the substance of Schiro's confession. R. 888-935. On appeal petitioner complains that his confession was obtained in violation of the Fifth, Fourth and Fourteenth Amendments to the Constitution because he was not notified of his *Miranda* warnings; he therefore argues that his confessions and the ensuing confessions to his girlfriend should have been suppressed at trial.

[14] The procedural safeguards of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), only apply to custodial interrogations. *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990); *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). In order to determine whether Schiro's confession to Hood was made during the course of a custodial interrogation, the Indiana Supreme Court examined the surrounding circumstances. According to that court, Schiro approached his work release counselor and asked to discuss something "heavy." The work release counselor thought that Schiro's problem concerned his alcoholism and referred him to Executive Director Ken Hood, to whom Schiro had spoken earlier that day. Hood felt that Schiro wanted to talk and asked him general questions regarding the reason for his seeking their conversation.

> "Although Hood said every indication was against it, he finally asked Schiro if he drove the victim's car and parked it near the facility. When Schiro nodded affirmatively, Hood told him he did not believe him because the records indicated that Schiro had been in the facility when the crime took place. Schiro said that the night watchman or manager had falsified the sign-in sheet. Still disbelieving, Hood asked some more questions about the murder. When Schiro mentioned that he worked near the victim's apartment, and Hood knew this to be true, Hood finally believed Schiro was responsible for the murder [which Schiro had confessed to Hood]. Flabbergasted, Hood telephoned a judge for assistance. Schiro's attorney was in the judge's chambers and told Schiro to avoid saying anything about the crime. Hood then escorted Schiro to the police station."

451 N.E.2d at 1047, 1060-1061.

[15] On the basis of these facts, the Indiana Supreme Court held that Schiro was not subject to custodial interrogation at the time of his confession to Hood. The question of custodial interrogation is a mixed question of law and fact. This Court has recently noted that mixed questions of law and fact should be reviewed under a clearly erroneous standard. *United States v. Levy*, 955 F.2d 1098, 1103 n. 5 (7th Cir.1992); *Mars Steel Corp. v. Continental Bank*, 880 F.2d 928, 933-937 (7th Cir.1989) (en banc); *Mucha v. King*, 792 F.2d 602, 604-606 (7th Cir.1986); but see *United States v. Hocking*, 860 F.2d 769 (7th Cir.1988). We have suggested without deciding that a clearly erroneous standard of review is appropriate in habeas corpus cases as well as other types of cases. *Stewart v. Peters*, 958 F.2d 1379 (7th Cir. 1992); *Hanrahan v. Greer*, 896 F.2d 241, 244 (7th Cir.1990). That question need not be resolved here since the outcome of our decision would be the same under either *de novo* or clear error review.

[16] When reviewing whether a defendant was in custody at the time of a confession, this Court examines the totality of the circumstances, especially the degree of restraint on the suspect's freedom. *United States v. Hocking*, 860 F.2d 769, 772 (7th Cir.1988) (noting that the key determination is whether at the time of interrogation the defendant was subjected to a "restraint on [his] freedom of movement of the degree associated with formal arrest"). Schiro contends that he was in custody at the time of his confession to Hood because the Second Chance Halfway House is a penal facility which confines residents unless they have express authorization to leave.

Sureeporn Roll v. State, 478 N.E.2d 161, 163 (Ind.App.1985).

[17] This Court rejects Schiro's assertion that any statement made by a defendant while he is under some type of supervision *ipso facto* constitutes custodial interrogation. *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394, 2397 (rejecting "the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent"). Cf. *Williams v. Chrans*, 945 F.2d 926, 950-954 (7th Cir.1991) (questioning by probation officer did not constitute custodial interrogation); *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (routine meeting between defendant and his parole officer not considered to be custodial interrogation).

[18] Schiro voluntarily approached Hood and asked to speak with him. Schiro was free to leave Hood's office at any time. The environment at the time of Schiro's confession to Hood bears slight resemblance, if any, to the type of coercive police conduct which the Fifth Amendment was designed to prevent. Cf. *Roberts v. United States*, 445 U.S. 552, 560-561, 100 S.Ct. 1358, 1364-1365, 63 L.Ed.2d 622 (1980) (no custodial interrogation where defendant initiated interview with investigators); *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602, 1630 ("volunteered statements are not barred by the Fifth Amendment"). Unlike statements made during custodial interrogation without prior *Miranda* warnings, statements made during a noncustodial interrogation without such *Miranda* warnings do not enjoy any presumption of coercion. *United States v. Fazio*, 914 F.2d 950, 956 (7th Cir.1990). Because Schiro's confession to Hood was not made during custodial interrogation, *Miranda* warnings were not required and Hood's testimony regarding Schiro's confession was properly admitted into evidence at trial. As Schiro's confession was properly entered into evidence, this Court need not address Schiro's further claim that testimony regarding his voluntary confession to his girlfriend was unconstitutional as a fruit of the confession to Hood. No impropriety is asserted with respect to his confession to a fellow prisoner.

F. Deceptive Behavior at Trial

[19] According to Judge Rosen, Schiro tried to deceive the jury into believing that he was mentally ill.[13] Judge Rosen stated:

> This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial, *except* when the jury left the courtroom. In the court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation.

Trial Court's Sentencing Judgment of October 2, 1981. On appeal, Schiro asserts violations of his Fifth, Sixth, Eighth and Fourteenth Amendment rights because Judge Rosen allegedly based his decision to impose the death penalty on his outer chambers observation of Schiro.

The Indiana Supreme Court found that Judge Rosen did not consider Schiro's apparently deceptive behavior at trial as an aggravating factor which justified imposition of the death penalty. *Schiro v. State*, 479 N.E.2d 556 (1985). Rather, Judge Rosen's observation sought to explain why the jury recommended a sentence which was against the manifest weight of the evidence produced at trial. The Indiana Supreme Court's factual determination is binding on this Court absent clear error, 28 U.S.C. § 2254(d), which has not been shown.

G. Manacles and Shackles

[20] Schiro contends that as he exited an elevator in the courthouse and passed through a hallway there, the jury viewed

13. The trial judge was not the only one to observe that some of Schiro's mannerisms appeared to be "a caricature of someone mentally ill" R.44 (psychiatric evaluation by Dr. Bernard Woods).

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 8, 1992.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon FRANK H. EASTERBROOK, Circuit Judge

Hon. HARLINGTON WOOD, JR., Senior Circuit Judge

THOMAS SCHIRO, Petitioner-Appellant, No. 91-1509 vs. RICHARD CLARK, Superintendent, and INDIANA ATTORNEY GENERAL, Respondents-Appellees.	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 83 C 588 Allen Sharp, Chief Judge.

ORDER

On consideration of the petition for rehearing and suggesion for rehearing en banc filed by petitioner-appellant on August 21, 1992, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

[t]he courts have long recognized that Congress gave the NLRB [National Labor Relations Board] exclusive jurisdiction over unfair labor practices. Thus, the Supreme Court has stated that the NLRA "preempts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act." *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees [v. Lockridge]*, 403 U.S. 274, 276 [91 S.Ct. 1909, 1913, 29 L.Ed.2d 473] (1971) (explaining the labor law pre-emption doctrine established in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 [79 S.Ct. 773, 3 L.Ed.2d 775] (1959)). *See also Veal v. Kerr-McGee Coal Corp.*, 682 F.Supp. 957, 959 (S.D.Ill.1988), *aff'd*, 885 F.2d 873 (7th Cir.1989) ("when an activity is either expressly or arguably protected by § 7 or prohibited by § 8 [of the NLRA], a claim arising out of that activity is preempted by the Act.")

McDonough v. Gencorp, Inc., 750 F.Supp. 368, 369–70 (S.D.Ill.1990).

Section 8 of the NLRA proscribes as an unfair labor practice coercion of an employee who is exercising his rights under the NLRA. 29 U.S.C. § 158(a)(1) (1989). Section 8 also prohibits discrimination in regard to hire or tenure of employment to encourage or discourage membership in a labor organization. 29 U.S.C. § 158(a)(3) (1989). It appears that the actions complained of fall within the proscriptions of the NLRA. They are, therefore, within the exclusive domain of the NLRB, and this Court cannot exercise original jurisdiction over them.

Defendant's motion is GRANTED, and the complaint is DISMISSED. All other motions are DENIED as MOOT.

IT IS SO ORDERED.

Thomas SCHIRO, Petitioner,

v.

Richard CLARK, and Indiana Attorney General, Respondents.

Civ. No. S83-588.

United States District Court, N.D. Indiana, South Bend Division.

Dec. 26, 1990.

After defendant's state capital [illegible] conviction was affirmed on direct [illegible] for 451 N.E.2d 1047, defendant [illegible] for writ of habeas corpus. The [illegible] Court, Allen Sharp, Chief Judge, held: (1) trial judge's decision to impose [illegible] penalty after jury returned contrary [illegible] mendation did not violate double [illegible] (2) issues not raised in state [illegible] could not be considered for first [illegible] collateral review; (3) trial judge's [illegible] posttrial statement concerning [illegible] did not indicate bias or prejudice [illegible] lated defendant's rights; (4) defendant [illegible] not denied effective assistance of [illegible] and (5) Indiana's death penalty statute [illegible] constitutional.

Writ denied.

1. Criminal Law ⇐636(9)

After state Supreme Court [illegible] defendant's case to trial court for [illegible] entry reflecting reasons for death [illegible] tence, defendant did not have right [illegible] present when trial court entered [illegible] findings on remand. [illegible] U.S.C.A. [illegible] Amend. 6.

2. Double Jeopardy ⇐111

State Supreme Court order [illegible] defendant's case to trial court for [illegible] entry reflecting reasons for death [illegible] did not violate double jeopardy [illegible] mand was not because of insuffic[illegible] dence, but was designed to give [illegible] Court more explicit statement of [illegible] for death sentence. U.S.C.A. [illegible] Amend. 5.

3. Double Jeopardy ⇐111

Trial judge's decision to impose death [illegible] after jury recommended that death [illegible] not be imposed did not violate double jeopardy, where jury's verdict was ad[illegible] under state law. West's A.I.C. 35-[illegible] U.S.C.A. Const.Amend. 5.

4. Criminal Law ⇐412.1(1)

Defendant's incriminating statements [illegible] director of work release program in [illegible] defendant was serving sentence at [illegible] of murder were not result of state [illegible] interrogation and did not violate [illegible] defendant's initiated conversation with director, and director merely listened to defendant's voluntary statement. [illegible] Const.Amend. 5.

5. Criminal Law ⇐822(1)

[illegible] on verdict forms given to [illegible] first degree murder case were re[illegible] to be examined as a whole to determine whether they passed constitutional [illegible]

6. Habeas Corpus ⇐312

[illegible] not raised in state court pro[illegible] were not subject to collateral review in federal habeas corpus proceeding. [illegible] § 2254.

7. Habeas Corpus ⇐775(2)

[illegible] of whether search warrant was [illegible] violation of Fourth Amendment [illegible] be raised in federal habeas proceeding, where issue was fully and fairly [illegible] in state courts. U.S.C.A. Const. [illegible] 28 U.S.C.A. § 2254.

8. Habeas Corpus ⇐490(1)

[illegible] of whether letter written by petitioner [illegible] admissible in his state murder [illegible] since it was not properly authenticated [illegible] question of state law of evidence [illegible] not be considered by federal [illegible] on collateral review. 28 U.S.C.A. [illegible]

9. Habeas Corpus ⇐498

[illegible] error arising when trial court re[illegible] instruct jury that it could not [illegible] defendant's demeanor in court [illegible] arriving at its verdict in murder [illegible] was not of constitutional variety, and could not be considered for first time in federal habeas corpus proceeding. 28 U.S.C.A. § 2254.

10. Constitutional Law ⇐268(5)

Criminal Law ⇐700(3)

State's failure to disclose testimony of rebuttal witness who had allegedly been raped by defendant prior to trial did not violate due process in murder prosecution; witness' testimony was inculpatory, rather than exculpatory, and defendant did not rely on alibi defense. U.S.C.A. Const.Amend. 14.

11. Habeas Corpus ⇐490

Even if state's failure to disclose testimony of rebuttal witness who had allegedly been raped by defendant was error in murder prosecution, any error was harmless, where defendant admitted to 23 sexual attacks, of which incident with witness was only one, in effort to have jury conclude that he was mentally deranged. U.S.C.A. Const.Amend. 14.

12. Criminal Law ⇐1162

Constitutional errors in criminal trial are grounds of reversal unless they are harmless beyond reasonable doubt.

13. Habeas Corpus ⇐490(1)

In determining whether evidence of guilt was "overwhelming" as part of harmless error analysis, court is not to engage in reweighing of evidence to determine impact on jury's verdict; rather, court must examine all evidence to determine impact of objectionable evidence on jury's verdict.

14. Criminal Law ⇐854(1)

Refusing to sequester jury in murder prosecution was not constitutional error, where case was tried in small community with no local radio or television station and only weekly newspaper, and there was no showing that any juror was exposed to media coverage during trial.

15. Costs ⇐302.4

State trial court provided indigent defendant with sufficient expert psychiatric assistance to satisfy constitutional requirements in capital murder prosecution; two independent court-appointed psychiatrists

record under *Miller v. Fenton*, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

It is also basic that this court does not act as a general court of common law review, but acts under a specific federal statute that limits its consideration to errors properly preserved and exhausted that are of a constitutional dimension. The Supreme Court of Indiana, in the direct appeal of this case in *Schiro v. State*, 451 N.E.2d 1047, the basic facts are stated as follows:

The evidence most favorable to the State reveals that the body of Laura Luebbehusen was discovered in her Evansville home on the morning of February 5, 1981. Laura's roommate, Darlene Hooper, and Darlene's ex-husband, Michael Hooper, discovered the body. Darlene had spent the previous night at Michael's apartment. The two found the home in great disarray, with blood covering the walls and floor. Laura's body was found near the door, her legs spread apart, and her slacks were pulled down around her ankles. The police were called and recovered a large broken vodka bottle, a handle and metal portions of an iron, a partially consumed bottle of wine, a pint bottle of vodka, and empty alcoholic beverage cans and bottles in the garbage.

Dr. Albert Venables testified as the pathologist who performed the autopsy on the victim. Dr. Venables found a number of contusions on the body but he stated that Laura Luebbehusen had been strangled to death. A number of wedge-shaped injuries on the head were most likely caused by a blunt instrument. Dr. Venables also found lacerations on the nipple and a thigh, and a tear in the vagina, all caused after the victim's death. A forensic dentist confirmed that the injury to the thigh was a human bite mark.

A few days after Laura Luebbehusen's body was discovered, her Toyota automobile was found about one block away from the Second Chance Halfway House. Defendant Schiro was a resident at the Halfway House, which tried to assist former criminals in finding employment and remove any obstacles that they face when released from prison. It also housed people who were sent there for treatment and counseling in lieu of sending them to prison from the local courts.

The director of the Halfway House, Ken Hood, asked a counselor to check the sign-in and sign-out sheets to see if any of the residents had been out at the time of the Luebbehusen murder. While the counselor was examining the sign-out sheets, Schiro approached him and asked if he could talk about something that was very "heavy." The counselor told Schiro to speak to Ken Hood. Schiro admitted to Hood that he had killed Laura Luebbehusen. Hood contacted the police and took Schiro down to the station.

Jimmy Wolff was Schiro's roommate at the Halfway House. Wolff testified that Schiro arrived at the room about 5:00 a.m. on February 5, 1981, the day Laura Luebbehusen's body was found. Schiro told Wolff he had to go downstairs and straighten things out so he would not get in trouble about being out all night.

After Schiro confessed to Ken Hood, the police searched his room and determined that the blood on a jacket found in the room was consistent with that of the victim, but not consistent with Schiro's blood. While in a holding cell in Vanderburgh County Jail, Schiro told another inmate that he had been drinking and taking Quaaludes the night of the killing, and had intercourse with the victim before and after killing her.

Mary T. Lee, Schiro's girlfriend, testified that shortly after the murder was committed, Schiro visited her in Vincennes and admitted that he killed Laura Luebbehusen. Schiro told Lee that he gained entrance to the victim's home on the pretext that his car had broken down. After pretending to use the telephone to call for assistance, Schiro asked if he could use the bathroom. He came out of the bathroom exposed but told Laura not to be alarmed because he was "gay." This story Schiro made up in order to gain the victim's confidence. Schiro further told Luebbehusen that some "gay" friends had bet him that he could not "get it on" with a woman and he just wanted to win the bet. Schiro and Luebbehusen talked about homosexuality and Luebbehusen told Schiro that she, too, was "gay." Darlene Hooper, Luebbehusen's roommate, had testified earlier that Laura was a practicing lesbian and that she had an aversion to men.

Schiro roamed through the house and came back with two dildoes and had Laura Luebbehusen try to insert one into his anus. He found the experience too painful and told Luebbehusen he would make love to her instead. A dildo, identified at trial as the one taken from the house, was recovered in Vincennes. Mary Lee told the police where Schiro had disposed of it after showing it to her. After intercourse, Luebbehusen tried to leave but Schiro stopped her, dragged her back into the bedroom, and raped her. During this time the two had been drinking. When the liquor ran out, they left to go buy more and returned to the house. Schiro fell asleep but woke up when Luebbehusen again attempted to leave. Schiro forced her to remain and she fell asleep on the bed. While Luebbehusen slept, Schiro felt the urge to kill her, grabbed the vodka bottle and beat her on the head until the bottle broke. He then beat her with the iron and when she resisted his attack, finally strangled her to death. Schiro then dragged Luebbehusen into another room, undressed her, and sexually assaulted the corpse.

Schiro, 451 N.E.2d at 1049-1050.

[1] An issue was raised with regard to the so-called proportionality. The validity of any such issue in this case appears to have been laid aside by the Supreme Court of the United States in *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), and reaffirmed in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). The issue also appears to have emerged in regard to the double jeopardy clause of the Fifth Amendment of the Constitution for the United States, as made applicable to the states under the Fourteenth Amendment. The complaint seems to be that somehow the double jeopardy clause of the Fifth Amendment was violated. For a discussion of that clause recently by this court, see *United States v. Crampier*, 636 F.Supp. 396 (N.D.Ind.1986); *See also Grady v. Corbin*, — U.S. —, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). This argument seems to spring from the action of the Supreme Court of Indiana when by order of February 11, 1983, it remanded to the Brown Circuit Court for a written entry reflecting the reasons for this death sentence. Somehow it is contended that this action violates the Double Jeopardy Clause. Even more far fetched is the argument that somehow the petitioner had the right to be present when the Brown Circuit Court entered its written findings on that remand. He had no more right to be present then than he had a right to be present when the justices of the Supreme Court conferred on his case.

[2] In any event, it appears that *United States v. Cosentino*, 869 F.2d 301, 309 (7th Cir.1989), has answered that double jeopardy question adverse to the petitioner. Where a new entry was made on the basis of evidence already in the record, there is neither a constitutional right to be present when that formal entry is made by the state trial judge nor is the double jeopardy clause violated, the practice of appellate courts in remanding cases for more explicit findings is commonplace in both criminal and civil appeals. The Supreme Court of the United States has upheld a death sentence entered pursuant to a remand even when there is a deficiency in the first sentence. *See Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986). It does not appear in this case that this remand was because of insufficient evidence, but it was designed to give the Supreme Court of Indiana a more explicit statement of the reasons for this death sentence. Such is altogether proper action by the Supreme Court of Indiana. *See Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1989). The Supreme Court has also dealt with the double jeopardy concept where there is a new sentencing

examined defendant as to competency to stand trial and insanity at time of trial.

16. Homicide ⇐354(1)

Defendant's sentence could not be enhanced in first-degree murder prosecution on grounds he manipulated jury by rocking in his chair while in jury's presence.

17. Constitutional Law ⇐268(8)
Criminal Law ⇐655(1)

Although state trial judge erred in expressing his moral indignation regarding defendant's murder case when he gave ex parte posttrial statement to newspaper reporter indicating that "the boy is going to fry," statement did not exhibit such bias or prejudice against defendant so as to violate defendant's due process rights. U.S.C.A. Const.Amend. 14.

18. Double Jeopardy ⇐103

Jury's failure to find defendant guilty on two counts of information charging defendant with murder did not amount to judgment of acquittal for double jeopardy purposes. U.S.C.A. Const.Amend. 5.

19. Double Jeopardy ⇐100, 103

It is constitutional condition precedent to application of double jeopardy clause of Fifth Amendment of the Constitution that there be an acquittal, whether there is acquittal depends largely on state law. U.S.C.A. Const.Amend. 5.

20. Criminal Law ⇐641.13(7)

Defendant charged with capital murder was not denied effective assistance of counsel on grounds defense counsel failed to present mitigating evidence at sentencing hearing, defense counsel presented evidence concerning defendant's personal history during guilt phase of trial, including testimony by defendant's father, then argued mitigating factors to jury and to judge at sentencing. U.S.C.A. Const.Amend. 6.

21. Criminal Law ⇐641.13(7)

Defendant has right to effective assistance of counsel at sentencing, however, strategic decision are accorded substantial deference. U.S.C.A. Const.Amend. 6.

22. Criminal Law ⇐641.13(1)

There is presumption that effective assistance of counsel is rendered until contrary is shown, and burden is on defendant to do so. U.S.C.A. Const.Amend. 6.

23. Criminal Law ⇐641.13(6)

Defendant was not denied effective assistance of counsel in capital murder prosecution when defense counsel failed to make inquiry when defendant allegedly told him that state's witness had been coerced into testifying, where some of witness' testimony was favorable to defendant and was cumulative to testimony of court-appointed psychiatrist. U.S.C.A. Const.Amend. 6.

24. Habeas Corpus ⇐481

Evidence that petitioner was handcuffed and shackled outside courtroom during breaks in court proceedings and going to and from courthouse in state capital murder trial was not grounds for federal habeas relief, absent evidence that jurors saw petitioner in that condition. 28 U.S.C.A. §§ 2254, 2254(d).

25. Constitutional Law ⇐276(1)
Criminal Law ⇐1208.1(2), 1213.2(2)

Indiana's death penalty statute did not violate due process clause of Fourteenth Amendment, Sixth Amendment or Eighth Amendment on grounds it gave sentencing judge authority to impose death sentence even after jury had made contrary recommendation. West's A.I.C. 35-50-2-9, U.S.C.A. Const.Amends. 6, 8, 14.

26. Homicide ⇐356(2)

Factual record supported sentencing judge's decision to impose death penalty under Indiana's capital murder statute after jury recommended against imposing death sentence. West's A.I.C. 35-50-2-9.

Alex Voils, Indianapolis, Ind., for petitioner.

David A. Arthur, Deputy Atty. Gen., Indianapolis, Ind., for respondents.

MEMORANDUM AND ORDER

ALLEN SHARP, Chief Judge.

On December 28, 1983, this petitioner, Thomas Schiro, filed the within petition seeking relief under 28 U.S.C. § 2254. This case has been pending since and counsel has been appointed for this petitioner. The full state court record consisting of eight (8) volumes has been filed and examined pursuant to the mandates of *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Numerous proceedings have been held, the most recent one an oral argument in Lafayette, Indiana on November 8, 1990.

This petitioner, Thomas Nicholas Schiro, was convicted of murder while committing or attempting to commit rape in the Brown Circuit Court, at Nashville, Indiana, on or about September 12, 1981. Although the jury in a bifurcated death penalty proceeding did not recommend the death penalty, the Honorable Samuel R. Rosen, the Judge of that court, imposed the death penalty on this petitioner on October 2, 1981.

On direct appeal to the Supreme Court of Indiana, the aforesaid conviction was affirmed in *Schiro v. State*, 451 N.E.2d 1047 (Ind.1983), *cert. denied*, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983).

An amended petition for post-conviction relief was filed in the Brown Circuit Court on May 11, 1984, and was heard by the Honorable James M. Dixon acting as special Judge. Judge Dixon denied that petition for post-conviction relief after a hearing on May 29, 1984, and the Supreme Court of Indiana affirmed the denial of post-conviction relief as reported in *Schiro v. State*, 479 N.E.2d 536 (Ind.1984), *cert. denied*, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (1986) (Brennan and Marshall, J., dissenting).

When the second appeal got to the Supreme Court of Indiana in *Schiro v. State*, 519 N.E.2d 506 (1988), Justice Prentice concurred in the denial of post-conviction relief and in the opinion authored by Chief Justice Givan thereon. Only Justice DeBruler dissented, citing *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); and *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). A further petition for post-conviction relief was filed in the state court. Special Judge John Baker of Bloomington, Indiana, now a judge on the Court of Appeals of Indiana, heard that petition and denied same which was appealed to the Supreme Court of Indiana, which affirmed the decision of Judge Baker in *Schiro v. State*, 533 N.E.2d 1201 (Ind.1989), *cert. denied*, — U.S. —, 110 S.Ct. 268, 107 L.Ed.2d 218 (1989). In that appeal, the Supreme Court, speaking through Justice Pivarnik, denied claims of ineffective assistance of counsel made under the Indiana Post Conviction Remedy Rule, and Justice DeBruler again dissented, primarily on the ground that the recommendation of the jury was an acquittal, triggering the protections of the double jeopardy clause. In this effort, he picked up the concurring vote of Justice Dickson.

Numerous proceedings have been held in this case, including a final oral argument in Lafayette, Indiana, on November 8, 1990, and this petitioner has had the benefit of able and experienced appointed counsel throughout these proceedings. An amended petition seeking relief under 28 U.S.C. § 2254 was filed here August 19, 1986, and that petition and the return addressing it form the issues to be decided by this court.

It is basic and elementary that this court is here engaged in collateral review which must focus only on constitutional issues properly raised and exhausted. *See Bell v. Duckworth*, 861 F.2d 169 (7th Cir.1988), *cert. denied*, 489 U.S. 1088, 109 S.Ct. 1552, 103 L.Ed.2d 855 (1989). There is nothing conceptual with reference to cases in which the death penalty is imposed that changes the basic scope of this court's collateral constitutional review under § 2254. As a matter of reality, it is to be noted that a good number of steps have been taken by the Court of Appeals in this circuit to insure that this variety of federal habeas review is done in a most careful fashion. In this vein, this court has made a full independent review of all of the state

hearing in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

Certainly, if a new hearing can be constitutionally held, the Supreme Court of Indiana is well within its authority to request a more explicit written finding from the sentencing trial judge on the basis of the evidence already presented. Certainly, the double jeopardy clause of the Fifth Amendment of the Constitution of the United States does not inhibit that process. Neither is the confrontation clause of the Sixth Amendment of the Constitution of the United States violated in such a situation. *See Kentucky v. Stincer*, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987).

A far more fundamental concern is the simple fact that the jury recommended against the death penalty and Judge Rosen chose to impose one. The Indiana statute permits that to happen and that statute on its face passes constitutional muster. In this regard, it is necessary to here set out the statement of Judge Rosen:

PRONOUNCEMENT OF SENTENCE

The Defendant, having been found guilty by a jury on the 12th day of September, 1981, and the Court having entered judgment of conviction of the crime Murder/Rape, and on September 15, 1981, the Court having heard arguments by Jerry Atkinson, Deputy Prosecuting Attorney for the State of Indiana, and Michael Keating, for the Defendant, and both the State and counsel for Defendant having moved to incorporate the evidence of the trial, which motion was granted by the Court, and the jury having returned their unanimous recommendation to the Court that the death penalty not be imposed on the Defendant, and the Court having reviewed the evidence of the trial thereafter, and having considered the written presentence report, gives the following reasons for the imposition of the sentence. The jury in its verdict of guilty of Murder/Rape, rejected the plea of insanity. The testimony of the Court appointed Psychiatrists, Charles H. Crudden, M.D., and Bernard R. Woods, M.D., both indicated that the Defendant is in good contact with reality and is not psychotic or insane. His conversations were relevant and coherent, with a good understanding of the charges against him and the possible consequences of these charges, as well as an understanding of the roles of the defense attorney, the prosecuting attorney, the jury and the Judge. Their prognosis for the Defendant is very poor and they concluded that this Defendant is now and will be a dangerous person in the community. David Crane, M.D., the attorney and psychiatrist, indicated that from a review of the autobiographical statement by the Defendant submitted into evidence by the Defendant's attorney, which indicated that Defendant had committed numerous rapes and acts of criminal deviate conduct, is a dangerous person, but like the Court appointed psychiatrists, found the Defendant to be sane at the time of the offense. The Defendant's own witness, a psychologist, Dr. Frank Osanka, indicated that the Defendant is "overpowered by the need for erotic release." Mary T. Lee, with whom the Defendant had lived, testified to vicious sadistic assaults on her infant under the age of two years, by immersing the said infant under water until the child stopped breathing and then resuscitating the infant. Mary T. Lee also testified that he had knocked out her front teeth with his fist. Linda Gail Summerford, a witness for the State, testified at length of a violent rape committed by the Defendant, in the presence of her child, a victim of cerebral palsy, and under threat of harm to said child. In her testimony she identified the Defendant, and Defendant's counsel had no questions and made no objections to her testimony. At no time has the Defendant indicated any remorse. These are aggravating circumstances.

The fact that the Defendant committed these crimes with gruesome, sadistic acts, including necrophilia, but nevertheless wore gloves so that there would be no trace of fingerprints, and transported said gloves to his girlfriend, Mary T. Lee, for disposal, as he had likewise transported the dildo to Vincennes to be thrown in a waste barrel behind a bar, indicated the Defendant's thoughtful planning to escape being caught. This is an aggravating circumstance.

The Defendant had been previously convicted of robbery, a class C felony, in Vanderburgh County, and was on work release when arrested for this crime. This is an aggravating circumstance.

This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial, *except* when the jury left the courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced the jury in its recommendation.

The age of the Defendant is twenty years. This is not a mitigating circumstance, nor was the age of the victim, twenty eight years, a mitigating circumstance.

For all of the above reasons, the Court now sentences the Defendant to death. The sentence is required by the Statutes of the State of Indiana, as all of the aggravating circumstances listed herein by far outweigh any mitigating circumstances.

The Court has no choice but to follow the law.

The Defendant is to be executed as by law provided on the 28th day of January, 1982, before sunrise.

The Defendant is remanded to the custody of the Sheriff.

The petitioner through his counsel has been given the rare opportunity to have some sworn testimony by the sentencing judge which was elicited in post-conviction proceedings in the state court. One would hope that that does not become a regular tactic. A sentencing judge who imposes a death sentence has enough to worry about and should not be put on trial after the fact. It does not appear to this court to be necessary that a sentencing judge himself be put on trial and under oath before yet another judge to explain any sentence, including the death penalty. That is in the opinion of this Judge, not a very good way to properly manage the relationship between a trial judge and litigants and a trial judge and a reviewing appellate court. The procedure really creates many more problems than it solves, and such is the case here.

On the sentencing process, a presentence report was made available to this petitioner and his counsel which contained a mass of information, including an admission by the petitioner that he tried to manipulate people. An opportunity was provided to the petitioner and his counsel to comment on or object to the contents of that presentencing report. In fact, such a pleading was filed with reference to statements of a Dr. Crane. There is certainly evidence of the manipulative aspect of this petitioner's personality before the sentencing trial court.

[3] A double jeopardy argument is made with reference to the recommendation of the jury vis a vis the sentence of the trial judge. It is argued that the first judgment of the jury should preclude or bar a second judgment of the trial judge. However, the Indiana death penalty statute in Indiana Code § 35-50-2-9 places the sentencing function on the trial judge. A copy of the death penalty statute is marked Appendix "A" and attached hereto. The Supreme Court of the United States has specifically found that there is no constitutional requirement for so-called jury sentencing. *See Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). The Supreme Court of Indiana made the same decision in the first direct appeal at 451 N.E.2d at 1055. The so-called verdict of the jury in both Florida and Indiana are advisory. The same is also true in Alabama and the Supreme Court of the United States dealt with that statute in *Baldwin v. Alabama*, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985). In *Baldwin*, 472 U.S. at 372, 105 S.Ct. at 2728, the complaint was that the sentencing judge gave too much consideration to the jury's recommendation. However, the Supreme

Court of the United States directly answered the constitutional question here posed in *Spaziano*, 468 U.S. at 447, 104 S.Ct. at 3155. Paralleling that conclusion, the Supreme Court of Indiana was constitutionally correct in its ruling on the direct appeal in 1982.

In his concurring and dissenting opinion at 451 N.E.2d at 1064, Justice DeBruler details the argument that the recommendation of the jury against the imposition of the death penalty is in fact a "verdict" that invokes the double jeopardy clause of the Fifth Amendment of the Constitution of the United States as the same is incorporated into the Fourteenth Amendment. The argument is comprehensively and well stated but most respectfully, that argument has been categorically rejected by a majority in the Supreme Court of Indiana. In his concurring and dissenting opinion, Justice Prentice parallels the argument made by Justice DeBruler and adds a number of points that find their foundation primarily in state law.

The mandate in Indiana appears to be that a sentencing trial judge in imposing the death penalty must find by clear and convincing evidence reasons for declining to follow the jury's recommendation. *See Martinez Chavez v. State*, 534 N.E.2d 731 (Ind.1989). An argument is made along the way that Judge Rosen considered the Indiana statute to mandate rather than allow the death penalty. That is not a correct reading of the Indiana statutes and there is nothing in this record to indicate that Judge Rosen finally had that understanding of the statute. Judge Rosen obviously felt very strongly that based on the record and the case which he had seen and heard, the death penalty *should* be imposed.

[4] In the trial itself on the merits, there is a claim that the state trial judge erred constitutionally in the admission of incriminatory statements made by the director of the work release program in which Schiro was serving a sentence at the time of the murder. It is contended that the admissions thereof were in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Those statements were not in violation of *Miranda*, 384 U.S. at 436, 86 S.Ct. at 1602. As a matter of fact, the Supreme Court has gone considerably farther than the state trial judge did here. In *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), the petitioner was questioned by a probation officer and confessed to a crime and that testimony was not prohibited by *Miranda*. In this case, the petitioner voluntarily sought to talk to someone, that person being one Kenneth Hood. The petitioner initiated the conversation and that finding of fact was made explicitly by the Supreme Court of Indiana in 451 N.E.2d at 1061. Such finding of fact is presumed to be correct under 28 U.S.C. § 2254(d), but this court has made an independent examination of the record in that regard under *Miller v. Fenton*, 474 U.S. at 104, 106 S.Ct. at 446, and is in complete agreement with the aforesaid finding by the Supreme Court of Indiana in this regard.

In this case, that officer was merely listening to a voluntary statement initiated by the petitioner and *Miranda* was not violated. This is not an example of state-sponsored interrogation. In this instance, the voluntariness of the statement was clearly established under the mandates of *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

[5] An attack is made upon the verdict forms that were submitted. The jury was given a one-page form containing three paragraphs of possible verdicts and a blank space for the date and foreperson's signature under each paragraph. The jury considered the following language:

We, the jury, find the defendant not guilty.

We, the jury, find the defendant guilty of Murder while the said Thomas N. Schiro was committing and attempting the crime of rape as charged in Count II of the information.

We, the Jury, find the defendant guilty while the said Thomas N. Schiro was committing and attempting to commit the crime of criminal deviate conduct as charged in Count III of the information.

It is extremely doubtful that this rises to the level of a constitutional challenge. The jury was told that there could be a finding of guilty but mentally ill and that that applied to all three theories of murder. The instructions and verdict forms must be examined as a whole to determine whether they pass constitutional muster. *See California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987). It is important to note that this issue was not raised prior to the retirement of the jury.

[6] An effort is made to challenge the original charging information in a state court as being unverified. A facial examination clearly shows that it was indeed verified. The initial information dated and filed February 10, 1980, has been examined here. On April 9, 1981, there were requests for the death penalty filed by the Chief Deputy Prosecutor of Vanderburgh County, Indiana. That issue was never raised in the state courts and has been raised here for the first time. In *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), *reh'g denied*, 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989), Justice O'Connor stated:

A rule announced in *Harris v. Reed* [489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)], assumes that a state court has had the opportunity to address a claim that is later raised in a federal habeas proceeding. It is simply inapplicable in a case such as this one where the claim was *never* presented to the state courts. (emphasis added) 489 U.S. at 299 [109 S.Ct. at 1068-69].

It does not appear that the other concurring judges in *Teague*, 489 U.S. at 288, 109 S.Ct. at 1060 are at odds with the above quoted statement of Justice O'Connor. Their focus was primarily on the problem of retroactivity of the rule established in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Therefore, it seems clear that when *Teague*, 489 U.S. at 288, 109 S.Ct. at 1060, and *Harris*, 489 U.S. 255, 109 S.Ct. 1038, are considered in tandem issues that were never raised in the state courts are the proper subject of procedural default in this collateral review under § 2254. Were it to be otherwise, there could never be an end to this kind of collateral review. If a defendant convicted in a state court proceeding could file continuous assertions of issues and claims not previously raised in the state courts, and then claim the benefits of *Harris*, it would be very difficult if not impossible, to ever bring a § 2254 proceeding to an end. *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) might provide a cutoff in such cases. *See also Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). Certainly, this is a subject that has caught the attention of a special committee chaired by retired Justice Lewis F. Powell and a legislative solution to this kind of problem which pending in the Congress of the United States. However, under *existing* law, it appears that issues have not been raised in the state courts can and should be procedurally defaulted under the above analysis of *Harris v. Reed*, and *Teague v. Lane*.

Another effort is made to challenge whether *mens rea* was alleged in the charging information or is required by the relevant Indiana statute. Such issue does not appear to have been raised in any way in the state courts and under the above reasoning in *Harris* and *Teague*, cannot be presented here for the first time. It is subject to procedural default. There can be no question, however, that *mens rea* was an element of the crimes charged and that there was more than enough proof of its existence in the record in this case. Whatever conceptual merit this argument might have, it does not rise to a constitutional level in this case. *See Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

There is a charge that there is some variety of a due process violation, possibly a double jeopardy one, in that three Counts of murder with three allegedly different theories were charged when there was only one killing and one victim. This issue was never raised in the state courts and is raised for the first time here and is subject to procedural default under the above

and no local radio or television station. The record in this case in regard to any possible prejudicial publicity is light years away from *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), and *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). This issue was raised primarily under the guise of ineffective assistance of counsel and was dealt with in the third opinion by the Supreme Court of Indiana at 533 N.E.2d 1201 et seq. It must be examined under the mandates of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *United States v. Grizales*, 859 F.2d 442, 447 (7th Cir.1988), Judge Eschbach, speaking for the court stated:

> The Supreme Court has instructed that in evaluating the performance of a trial attorney we are to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2054. Appellant "has a heavy burden in proving a claim of ineffectiveness of counsel." *Jarrett v. United States*, 822 F.2d 1438, 1441 (7th Cir.1987) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). The Supreme Court has further cautioned appellate courts to resist the temptation to "second-guess" the actions of trial counsel after conviction. *Id.* It is clear that the performance of trial counsel should not be deemed constitutionally deficient merely because of a tactical decision made at trial that in hindsight appears not to have been the wisest choice. *See Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *United States v. Kennedy*, 797 F.2d 540, 543 (7th Cir.1986).

See also United States v. Adamo, 882 F.2d 1218 (7th Cir.1989). There is no showing that any juror was exposed to media coverage during trial. The Supreme Court of Indiana expressly made that finding at 533 N.E.2d at 1206. That finding, while presumptively correct, is also supported on the basis of an independent examination of the record under *Miller v. Fenton*, 474 U.S. at 104, 106 S.Ct. at 446. *See Rushen v. Spain*, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1984).

The burdens on a trial judge in a death penalty case are enormous. The appellate courts and the federal reviewing courts should not engage in second-guessing about how to best manage this awfully difficult judicial event. Each locale and each case has its own life and set of circumstances. There is nothing in this record to indicate that Judge Samuel Rosen violated the Constitution of the United States in his management, including lack of sequestration of this jury, during this trial. Most seasoned trial judges avoid sequestration of juries like the plague. Such is fraught with both personal and judicial problems. It is only when the factual record demonstrates that nothing short of sequestration will suffice should a reviewing court find a constitutional error. No basis to compel sequestration is to be found in this record.

[15] An issue is raised with reference to the claim that the state trial court failed to give this indigent petitioner expert psychiatric assistance. Even assuming that this somehow raises a constitutional right, this petitioner did have psychiatric assistance in the preparation of his defense in the person of Dr. Frank Osanka. The testimony challenging the credibility of Dr. Osanka was that of the petitioner himself. That testimony was specifically found to be incredible by the state trial judge who heard him. *See Schiro*, 533 N.E.2d at 1207. Assuming the best of this for this petitioner, his constitutional rights were not violated in that regard. There were two independent court-appointed psychiatrists who evaluated this petitioner as to both his competency to stand trial and his sanity at the time of the trial. Those psychiatrists did not conclude that the petitioner was insane but certainly the Constitution of the United States does not guarantee to a defendant charged with a serious death penalty crime the right to have a psychiatrist who will claim that he is insane. The mere statement of that proposition indicates its utter absurdity.

It should also be noted that the appointment of two independent court appointed psychiatrists meets the constitutional demands of *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

[16] Much is made of the so-called rocking/non-rocking situation. That brief factual slice of the record probably has gotten considerably more attention than it deserves. Manipulation is not a basis in Indiana for imposing a sentence of death and was not used and the Supreme Court of Indiana specifically found that it was not used in this case. *See* 479 N.E.2d at page 559. The Supreme Court of the United States has said in a general way that a sentence may be enhanced if the sentencing trial judge believes that the defendant's testimony was perjured. *See United States v. Grayson*, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978). However, when a sentencing judge does enhance a sentence for that reason, a defendant is not generally entitled to a hearing on that issue. *See United States v. Bartunsky*, 879 F.2d 30, 43 (2nd Cir.1989).

There is a right to have a sentence based on reliable and accurate information. *See Tucker v. United States*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). *See also United States v. Harris*, 558 F.2d 366 (7th Cir.1977).

[17] One of the issues raised post-conviction and here is that Judge Samuel Rosen exhibited bias and prejudice against this particular petitioner because of an alleged ex parte and post-trial statement that the boy is going to live. Certainly, there is a long-standing right to an impartial judge, as defined by Chief Justice Taft more than 60 years ago in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). In this regard, that court stated:

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. *Wheeling v. Black*, 25 W.Va. 266, 270. But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

No such problem exists in this case. What is involved here is reactions of this state trial judge after the fact rather than before the fact. Criminal trials that are envisioned under the Sixth Amendment of the Constitution of the United States are enormously human events. Judges who preside over such criminal trials which involve the grossest kind of violence that is visited by one human being on another are not required to put their potential for moral indignation on the back shelf. When a defendant is charged with a serious crime, regardless of how grotesque the charge may be and how heinous the conduct of that defendant may be, it is the sworn task of a presiding trial judge to comply as evenhandedly as possible with the mandates of the due process clause in following the law and the basic concepts of fairness that inhere. It would certainly be a sad day for either the state or federal judiciary if judges were required to be or become valueless and morally neutral. It would also be a sad day for the state and federal judiciary if a veteran trial judge somehow through the process of experience became immune to normal feelings of moral indignation at heinous and violent criminal conduct.

The record in this case most certainly justified these private feelings of moral indignation by this veteran state court judge. However, Judge Rosen erred, although not in a constitutional sense. In a case tried by this Judge, *United States v. Marcyes*, 631 F.2d 525 (7th Cir.1980), an issue was raised with regard to a comment that this Judge made in the course of that trial. Chief Judge Bauer (then Judge) of the United States Court of Appeals suggested at page 535 that the comment would have been better left unsaid. Nonetheless, the verdict of guilty in *Marcyes* was upheld on appeal, and that bit of judicial conduct did not create a constitutional defect.

Understanding the cultural environment that pervades places like Nashville, Indiana, apparently Judge Rosen made a

analysis of *Harris v. Reed* and *Teague v. Lane*. In any event, there was a finding of guilty *only* on Count II.

[7] An issue under the Fourth Amendment with reference to a search warrant is raised. It is alleged that the affidavit to obtain the warrant, the return of the warrant and the items seized under the warrant were improperly allowed into evidence. It is alleged that the person who issued the warrant was not a neutral and detached magistrate. It is further alleged that in part, the warrant was based on information provided by Kenneth Hood, above referred to, which was obtained in violation of the *Miranda* rule. Since there was no *Miranda* violation in that regard, that part of the argument here fails.

It appears that the Fourth Amendment issue in this regard was fully and fairly litigated in the state courts under the mandates of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Once that decision is made, it is not to be litigated here. *See also Willard v. Pearson*, 823 F.2d 1141 (7th Cir.1987); *Wallace v. Duckworth*, 778 F.2d 1215 (7th Cir.1985).

On the first direct appeal, this issue is dealt with at 451 N.E.2d at 1061. Even aside from *Stone*, 428 U.S. at 465, 96 S.Ct. at 3038, the decisions of the Supreme Court of the United States in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) would authorize the issuance of a search warrant. Although it is doubtful if it is necessary to go to *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), for salvation in this regard, certainly it also would provide a constitutional basis for the admission of the fruits of this search warrant.

There is some argument made that this issue was not fully and fairly presented to the state courts in the first instance under *Castille v. Peoples*, 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989), and *Cruz v. Warden of Dwight Correctional Center*, 907 F.2d 665 (7th Cir.1990). The court chooses not to bottom its decision in this regard on that concept, but rather bottoms it on the *Stone*, 428 U.S. at 465, 96 S.Ct. at 3038, concept.

[8] The next issue raised has to do with refusal of the state trial court to admit a letter allegedly written by the petitioner, but not admitted into evidence because of the failure to have the letter properly authenticated. This issue was presented to the Supreme Court of Indiana on direct appeal and resolved there at 451 N.E.2d at 1061 and 1062. It is highly doubtful if it raises a constitutional issue. At most it presents an issue of the state law of evidence which should not be interfered with by the federal judiciary on collateral review. It cannot be shown that its exclusion undermines the basic and fundamental fairness of these proceedings.

[9] Another issue is raised here for the first time regarding the modification of a certain instruction tendered by the petitioner. Again, this issue is foreclosed by the aforesaid reasoning in *Harris, and Teague*. In this regard, the defendant/petitioner tendered his instruction 15 which stated:

> The Defendant, Thomas Schiro, has not taken the witness stand as a witness. His failure to do so shall not, in any manner, be considered by you in arriving at your verdict, nor should you consider his appearance and demeanor in the courtroom during trial in arriving at your verdict.

In giving this instruction, the trial court struck therefrom "nor should you consider his appearance and demeanor in the court room during trial in arriving at your verdict." No authority is cited by this petitioner to demonstrate any errors here. Any error is not of the constitutional variety.

[10, 11] At trial, the state presented a rebuttal witness in the testimony of Linda Summerfield, sometimes called Linda Summerford. She allegedly was raped by the petitioner and recognized his picture as her attacker in the newspapers. A photograph or lineup was conducted and she picked out Schiro's picture in that display. There is a question here as to the Fourteenth Amendment duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). *See also United States v. Jackson*, 780 F.2d 1305 (7th Cir.1986); *Palmer v. City of Chicago*, 755 F.2d 560 (7th Cir.1985); *United States v. Fairman*, 769 F.2d 386 (7th Cir.1985); and *Carey v. Duckworth*, 738 F.2d 875 (7th Cir.1983). However, it does not appear to this court that this evidence is *ex culpatory*. In fact, it was very much *in* culpatory. It should be noted that this is not a case in which the alibi defense was imposed as was the case in *Mauricio v. Duckworth*, 840 F.2d 454 (7th Cir.1987) *cert. denied*, 488 U.S. 869, 109 S.Ct. 177, 102 L.Ed.2d 146 (1988). Neither is the concept of reciprocal discovery in the alibi context of *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) applicable. Any earlier non-disclosure of the existence of the testimony of Linda Summerfield (Summerford) violated none of the due process rights of this petitioner. This court chooses not to bottom its decision in this regard on procedural default, since there was some reference to it in the state record. The petitioner apparently in an effort to have the jury conclude that he was mentally deranged, admitted to 23 sexual attacks of which the incident with Linda Summerfield (Summerford) was only one. In any event, the due process clause was not violated. Even assuming the existence of some error in failing to disclose this rebuttal witness, the same is harmless beyond a reasonable doubt.

[12] Constitutional errors in a criminal trial are grounds for reversal unless they are "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The petitioner is entitled to a fair trial not a perfect one. *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986). *See also Stein v. Duckworth*, 864 F.2d 1348, 1356 (7th Cir.1988); *Ortega v. O'Leary*, 843 F.2d 258, 262 (7th Cir.1988), *cert. denied*, 488 U.S. 841, 109 S.Ct. 110, 102 L.Ed.2d 85 (1988). The harmless error rule "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436. *See also United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1017 (7th Cir.1988).

[13] The initial inquiry for the court then "is whether absent the constitutionally forbidden evidence, honest and fair minded jurors might very well have brought in not guilty verdicts." *Burns v. Clusen*, 798 F.2d 931, 943 (7th Cir.1986) (citing *Chapman v. California*, 386 U.S. 18, 26, 87 S.Ct. 824, 829, 17 L.Ed.2d 705 (1967)). The court must determine "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *United States ex rel. Ross v. Fike*, 534 F.2d 731, 734 (7th Cir.1976) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963)). This circuit generally requires other evidence of guilt to be "overwhelming" before concluding a constitutional error was harmless. *See Nalls*, 864 F.2d at 1358; *Smith v. Fairman*, 862 F.2d 630, 639 (7th Cir.1988), *cert. denied*, 490 U.S. 1008, 109 S.Ct. 1645, 104 L.Ed.2d 160 (1989); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1020 (7th Cir.1987); *Burns*, 798 F.2d at 943; *United States v. Shue*, 766 F.2d 1122, 1133 (7th Cir.1985). But in making this determination the court is not to engage in a reweighing of the evidence to determine the impact on the jury's verdict. *Freed v. Abrahamson*, 841 F.2d 760, 765 (7th Cir.1988). Rather, the court must examine all the evidence to determine the impact of the objectionable evidence on the jury's verdict. *Id. See also United States v. de Ortiz*, 883 F.2d 515 (7th Cir.1989), and *United States v. Check*, 882 F.2d 1263 (7th Cir.1989).

[14] There is also a constitutional issue raised with regard to the sequestration of the jury and the admonitions with reference to media accounts. It should be remembered that this case was tried in Nashville, Indiana, in one of the smallest and least populated counties in the State of Indiana, a town with a weekly newspaper

Finally, the prosecuting authorities have a substantial interest in seeing that a defendant on trial for a capital case remains in custody and does not escape from a small, rural courthouse and the adjacent jail. *See Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). *See also Clark v. Wood*, 823 F.2d 1241, 1245 (8th Cir.1987), *cert. denied*, 484 U.S. 945, 108 S.Ct. 334, 98 L.Ed.2d 361 (1987).

It should be noted that counsel's memorandum filed on September 4, 1990, on behalf of the petitioner deals exclusively with the question of intentionality. Although of some constitutional dimension, counsel's memorandum contains more of a question of complying in rather straightforward criminal law terms with the requirements of the Indiana death penalty statute. Petitioner asserts that Judge Rosen did not make a specific finding of fact of an intentional killing. The Supreme Court of Indiana ruled in *Fleenor v. State*, 514 N.E.2d 80 (Ind.1987), that Indiana's death penalty statute survives a constitutional challenge because it requires a finding of specific intent.

The first time the Supreme Court of Indiana reviewed the petitioner's case on direct appeal, it found that, "with the submission of the *nunc pro tunc* entry the trial court properly followed the required procedures in imposing the death sentence. The record justifies the finding of the aggravating circumstances that Thomas Schiro intentionally killed Laura Luebbehusen." *Schiro v. State*, 451 N.E.2d 1047, 1059 (Ind. 1983). This issue was held to be *res judicata* on petitioner's third post-conviction review. *Schiro v. State*, 533 N.E.2d 1201 (Ind.1989).

[25] This court agrees with the Supreme Court of Indiana's determination that Indiana's death penalty statute is constitutional and that Judge Rosen complied with it in sentencing Thomas Schiro.

I.C. § 35-50-2-9 states:

a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances alleged.

b) The aggravating circumstances are as follows:

1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

It is apparent that Justice Stevens and Justice DeBruler are judicially squeamish about the procedure under Indiana law, whereby a sentencing trial judge may impose a death sentence even after a jury has made a contrary recommendation. As a matter of federalism, the General Assembly of the State of Indiana has the option to enact such a procedure which on its face does not violate the due process clause of the Fourteenth Amendment, the Sixth Amendment, or the Eighth Amendment of the Constitution of the United States. Given the basics of federalism, this court should not disturb that state established procedure. *See Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

[26] With that procedural process established, the factual record must clearly support the imposition of the death penalty. The sentencing trial judge should not ignore the recommendation of the jury. However, that sentencing authority is fixed in that judge and not in the jury. The realities of the situation are that the sentencing judge faces a more rigorous standard in imposing the death penalty in the face of a contrary jury recommendation. The factual record must clearly justify the death sentence and the reasons given by the sentencing judge must be appropriate ones. The primary focus must be on the factual record as the foundation for the reasons stated. The values involved are far too important to become immersed in minor formalities. The Supreme Court of Indiana simply wanted from the sentencing trial judge a more complete statement of reasons for the imposition of the death penalty and it got same. Such procedure did not invoke the double jeopardy clause of the Fifth Amendment of the Constitution of the United States.

The reasons given for the imposition of the death penalty by the sentencing trial judge, both orally and in writing, have been fully set forth here. Those reasons spring from the factual record, are clearly reflected therein, and meet the constitutional standards currently applied by the Supreme Court of the United States in comparable cases.

It is a part of the *state* law of this case that the non-action of the jury on Counts I and III does not constitute an acquittal. It is not here necessary to write a constitutional treatise on the double jeopardy clause based on a hypothetical that some effort is being made to again try this petitioner on Counts I and III because that situation does not confront this court. In the reality of criminal prosecutions, it is commonplace for multiple and indeed alternative criminal charges to be submitted to a jury and for the jury to return a verdict on less than all of the charges submitted. It is not necessary for this court to determine whether there is perfect symmetry in the case law of Indiana in this subject area. In *this* case, *this* jury found *this* petitioner guilty of Count II and did not act on Counts I and III. The death penalty was imposed on Count II. There is nothing in the Fourteenth or Fifth Amendment of the Constitution of the United States that *compels* this court to label that non-action on Counts I and III as an acquittal for Fifth Amendment double jeopardy purposes. The Supreme Court of Indiana, with Justice DeBruler dissenting, did not so label it and a decent respect for the basic concepts of federalism does not compel this court to do otherwise.

Justice Stevens quotes Justice Powell, now retired, in stating that special and careful attention is required in regard to the consideration of death penalty cases. This court is in total agreement. No one can argue with those suggestions. The record in this case certainly reflects nearly a decade of state and federal court actions and reviews. More of the same will follow this decision. Notwithstanding the demands for special and careful review, this court must apply to the best of its ability and knowledge contemporarily established constitutional standards under the Eighth Amendment of the Constitution of the United States in its collateral review under 28 U.S.C. § 2254. With all deference and respect, it is the view here that such has been done.

In all of this review, it must be remembered that it was this veteran state trial judge who presided over all of the trial court proceedings resulting in the determination of guilt and it was he and not the reviewing appellate court and not this court, who saw all of the witnesses, heard and dealt with this case literally in all of its flesh and blood dimensions. In the precise areas of credibility determinations, the same should rest primarily and fundamentally with him and not with the reviewing courts, except upon a determination of a constitutional error.

There is no *constitutional* basis to disturb the imposition of the death penalty by this state trial judge in this case under 28 U.S.C. § 2254. Therefore, the writ must be DENIED. IT IS SO ORDERED.

APPENDIX A

35-50-2-9 Death sentence

Sec. 9. (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:

(A) Arson (IC 35-43-1-1).

(B) Burglary (IC 35-43-2-1).

gratuitous ex parte out-of-court comment to a newspaper reporter and the deputy prosecuting attorney. The post-conviction state judge heard testimony from Judge Rosen, the newspaper reporter and the deputy prosecuting attorney in regard to this incident. Based on that testimony, that post-conviction relief state judge made a specific finding of fact that there was no bias or prejudice by Judge Rosen. That decision was upheld by the Supreme Court of Indiana. However, this does not excuse the fact that state trial judges who preside over cases in which the death penalty is or may be imposed have enormously delicate responsibilities. Speaking ex parte after the fact to a newspaper reporter or a deputy prosecutor does not serve that proper judicial function. This court has examined this slice of the record with the greatest of care and delicacy and is convinced that there is very substantial support for the conclusion of the state courts in this regard and is convinced that there was no violation of the constitutional right as defined in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437. The facts in *Tumey* are a far cry from those here.

[18] The petitioner was found guilty of the charge in Count II. Somehow it is now attempted to extrapolate the fact that there was no finding of guilty under Count I of the information into a finding that there was no intentional killing and therefore the death penalty is not appropriate. In order to get to that result, a number of large jumps in logic and fact are necessary. The facts are that the petitioner was found guilty in Count II. The jury did not fill out a verdict form on Counts I or Count III. Somehow this becomes a double jeopardy claim. This petitioner was not acquitted by Counts I or III and neither was he found guilty. He was found guilty on Count II.

[19] It is a constitutional condition precedent to an application of the double jeopardy clause of the Fifth Amendment of the Constitution that there be an acquittal. Whether there is an acquittal depends largely on state law. *See Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). *See also United States ex rel. Young v. Lane*, 768 F.2d 834 (7th Cir.1985), *cert. denied*, 474 U.S. 951, 106 S.Ct. 317, 88 L.Ed.2d 300 (1985). The Supreme Court of Indiana in the first direct appeal stated that the jury's recommendation was "an intermediate step" in the process toward the court's final judgment. *See* 451 N.E.2d at page 1056. There is an analogy, although not a perfect one, between this situation and inconsistent verdicts. *See United States v. Reed*, 875 F.2d 107 (7th Cir.1989). There is simply no constitutional merit to the argument that somehow the failure of the jurors to render any decision on Counts I and III some way or other constitutes an acquittal which extrapolates into a double jeopardy argument that frees this defendant petitioner.

When it is all said and done, the judge of the Brown Circuit Court engaged in a fully constitutionally adequate sentencing procedure that has been fully and carefully explained on the record and in writing. It does not suffer from any constitutional deficiencies which causes this court to set it aside on collateral review. This case has now been to the Supreme Court of Indiana three times. While there are justices on that court who have expressed concerns, the majority of that court in each instance has declined to undermine this sentence of death. That court's recent history indicates that it is perfectly capable of reversing a death sentence. *See Smith v. Indiana*, 547 N.E.2d 817 (Ind.1989). *Cooper v. Indiana*, 540 N.E.2d 1216 (Ind.1989), and *Martinez Chavez v. State*, 534 N.E.2d 731 (Ind.1989). It is also very clear that Justices of the present Supreme Court of Indiana are more than capable of rendering individualized judgment in criminal death penalty cases. The record here is evidence of that kind of review. The Supreme Court of the United States has denied certiorari in this case three times. This court would especially note the statement of Justice Stevens in *Schiro v. State*, — U.S. —, 110 S.Ct. 268, 107 L.Ed.2d 218 (1989). With the greatest respect for Justice John Paul Stevens, it is the fervent hope of this court that the issues about which he expressed concern have been dealt with here in the fashion that he suggested.

An issue is raised with regard to the effective assistance of counsel under *Strickland*, 466 U.S. at 668, 104 S.Ct. at 2054, which requires both unprofessional conduct and actual prejudice. *See United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1013-14 (7th Cir.1987). That issue was thoroughly examined in the third opinion of the Supreme Court of Indiana at 533 N.E.2d at 1207. While this court cannot rely on the correctness of the legal judgment in that regard, it can presume as correct the historical facts under 28 U.S.C. § 2254(d). However, under *Miller v. Fenton*, 474 U.S. at 104, 106 S.Ct. at 446, this court has made an independent examination of the record in this regard and finds the various attempts to nitpick after the fact the conduct of defense counsel to be little more than that. This defense counsel was confronted with a most difficult situation and did a job which met Sixth Amendment professional standards.

[20-23] There is a charge that this defense counsel failed to submit mitigating evidence during a sentencing hearing, relying on *Dillon v. Duckworth*, 751 F.2d 805 (7th Cir.1984), *cert. denied*, 471 U.S. 1108, 105 S.Ct. 2341, 85 L.Ed.2d 859 (1985). In *Dillon*, there was no insanity defense and the assertion of such a defense opens a very wide door with regard to the character and history of a defendant. During the guilt phase of the trial, the personal history of the defendant was brought forward, including testimony by his father. Defense counsel argued the mitigating factors to the jury and to the judge at sentencing. A defendant has a right to effective assistance of counsel at sentencing. *See Barden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). However, strategic decisions are accorded substantial deference. *See Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987). There is a presumption that effective assistance of counsel is rendered until the contrary is shown and the burden is on the petitioner to do so. *See Santos v. Kolb*, 880 F.2d 941, 943 (7th Cir.1989). Certainly, a defense counsel is not required to present mitigating evidence when none exists. *See Smith v. Dugger*, 840 F.2d 787, 795 (11th Cir.1988). *United States v. Myers*, 917 F.2d 1008 (7th Cir.1990). It is further alleged that somehow the prosecution coerced Mary Lee into testifying and there was a failure to disclose so-called exculpatory evidence in this regard. This was raised as a claim of ineffective assistance of counsel in the state courts where it was claimed that the petitioner told his counsel that the state had threatened to take away Lee's child if she did not cooperate, but that the attorney did nothing about it. This claim appears to be at odds with the one made in the state court. Either the petitioner and his counsel knew about Mary Lee and it was therefore undisclosed, or they did not know and it should have been disclosed. Apparently, they can't have it both ways. In any event, there was no prejudice to the petitioner by the testimony of Mary Lee, some of which was indeed favorable to him. Testimony was also cumulative with reference to the testimony of the court-appointed psychiatrist. Certainly, her testimony did not change the outcome in this trial in favor of the petitioner. The record in this case, however, fails to disclose any coercion. In fact, the Supreme Court of Indiana found to the contrary at 533 N.E.2d page 1206. While that historical fact is presumptively correct under Title 28 U.S.C. § 2254(d), an independent examination of the record under *Miller v. Fenton*, 474 U.S. at 104, 106 S.Ct. at 446 discloses that it is correct in any event.

[24] Last of all, there is an attempt to make an issue with regard to the handcuffing and shackling of the petitioner outside the courtroom during breaks in court proceedings and going to and from the courthouse. There is no evidence in the record that any juror saw the petitioner in that condition. In another case, *Osborne v. Duckworth*, 567 F.Supp. 427 (N.D.Ind. 1983), this court was very concerned about an incident in the Adams County Courthouse in Decatur, Indiana, and granted a habeas corpus petition under 28 U.S.C. § 2254 because of it. That decision was reversed in an unpublished opinion by the Court of Appeals. *See* 757 F.2d 1292 (7th Cir.1985).

APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT—Continued

Title	Docket Number	Date	Disposition	Trial Court County
Edwards v. Madison County	82-42	12-7-82	Affirmed	Madison
Hansor v. Board of Trustees	82-131	12-8-82	Rev'd & rem.	Madison
Harner v. Green	81-339	9-21-82	Affirmed	Madison
G.T.M., In re	81-442	12-3-82	Affirmed	Alexander
Johnson v. Hull	81-498	11-9-82	Affirmed	Saline
Lauer v. Potts	81-694	11-9-82	Affirmed	Monroe
Marquis v. County of St. Clair	81-584	12-3-82	Affirmed	St. Clair
Meadowbrook Public Water District v. Kraushaar	81-354	12-7-82	Affirmed	Madison
Meyer v. State Farm Mutual Automobile Insurance Co.	81-659	12-7-82	Rev'd & rem.	Clinton
Mitchell v. Massey	81-510	10-27-82	Aff'd in pt. & rev'd in pt.	St. Clair
Nestrick, In re Estate of	82-47	11-1-82	Affirmed	Fayette
Newberry v. Newberry	82-58	11-24-82	Affirmed	Madison
Pearson v. Herrin	81-487	12-2-82	Affirmed	Madison
People v. Burnley	81-403	11-22-82	Affirmed	St. Clair
People v. Cherry	81-244	10-21-82	Affirmed	St. Clair
People v. Dixon	81-531	11-12-82	Affirmed	St. Clair
People v. Goessman	81-199	11-22-82	Rev'd & rem.	Franklin
People v. Hamilton	81-243	12-6-82	Affirmed	St. Clair
People v. Hampton	82-8	11-22-82	Affirmed	Shelby
People v. Hayes	81-165	12-13-82	Affirmed	Madison
People v. Jackson	82-60	12-10-82	Affirmed	St. Clair
People v. Johnson	81-632	11-9-82	Affirmed	St. Clair
People v. Jones	81-453	11-22-82	Affirmed	St. Clair
People v. Kellick	81-807	11-1-82	Affirmed	St. Clair
People v. Martin	82-183	12-13-82	Rev'd & rem.	Johnson
People v. McBroom	82-340	12-2-82	Affirmed	Montgomery
People v. McKenzie	81-471	12-10-82	Aff'd in pt., rev'd & rem. in pt.	Montgomery
People v. McMullin	81-427	11-9-82	Aff'd in pt., vac. in pt. & rem.	Madison
People v. McNeil	81-415	11-30-82	Aff'd in pt., vac. in pt.	Alexander
People v. Newsum	82-24	12-2-82	Affirmed	Jackson
People v. Partee	81-383	10-21-82	Affirmed	St. Clair
People v. Price	81-577	11-9-82	Affirmed	Franklin
People v. Shimer	80-370	11-9-82	Affirmed	Jefferson
People v. Smith	81-295	12-7-82	Affirmed	Williamson
People v. Statham	81-302	11-30-82	Affirmed	St. Clair
People v. Young	81-368	10-27-82	Affirmed	St. Clair
People ex rel. Irby v. Homyer	81-328	11-9-82	Rev'd & rem.	Madison
Pistor, In re Marriage of	82-102	12-8-82	Affirmed	St. Clair
P.S., In re	81-579	12-3-82	Vac. & rem.	St. Clair
R.L.M., In re	81-568	12-10-82	Affirmed	Alexander
Schaffner v. Great Midwest Fur Co.	82-43	11-3-82	Affirmed	Randolph
Shields v. Schicktanz	81-322	10-25-82	Aff'd in pt. & rev'd in pt.	St. Clair
Shop City, Inc. v. East St. Louis & Interurban Water Co.	81-644	12-2-82	Reversed	St. Clair
Sullivan v. Sullivan	81-410	10-27-82	Aff'd in pt., rev'd in pt. & rem.	Jackson

Thomas N. SCHIRO,
Defendant-Appellant,

v.

STATE of Indiana, Plaintiff-Appellee.

No. 1181S329.

Supreme Court of Indiana.

Aug. 5, 1983.

Defendant was convicted in the Brown Circuit Court, Samuel L. Rosen, J., of murder while committing or attempting to commit rape, and he appealed. The Supreme Court, Pivarnik, J., held that: (1) death penalty statute is constitutional; (2) trial court did not err in imposing death penalty; (3) statement given by defendant was an involuntary custodial statement required to be excluded from trial; (4) master commissioner had authority to issue search warrant; (5) letter written by defendant was inadmissible; (6) it was not reversible error to omit certain verdict forms; and (7) presentence report did not contain improper information.

Affirmed and remanded.

DeBruler and Prentice, JJ., filed concurring and dissenting opinions.

1. **Criminal Law** ⇐1206.1(2)

Death penalty statute is not unconstitutional, although defendant contended that statute did not provide a procedure to ensure that death penalty is not arbitrarily and capriciously applied where statute ensures that in all instances where death penalty is applied, trial judge must submit written findings indicating aggravating factors found to be present, thus guarding against the influence of improper factors. IC 35-4.1-4-3, 35-50-2-9 (1982 Ed.).

2. **Criminal Law** ⇐986(3)

In all cases involving finding of aggravating circumstances, sentencing judge must include statement of reasons for sentence he imposes. IC 35-4.1-4-3 (1982 Ed.).

3. **Criminal Law** ⇐1206.1(4)

Death penalty statute permits a trial court to overrule a jury's recommendation that death penalty not be imposed. IC 35-50-2-9 (1982 Ed.).

4. **Criminal Law** ⇐1206.1(6)

A jury's decision to impose death penalty must be unanimous; if it cannot reach a decision, alternative sentence of life imprisonment is imposed. IC 35-50-2-9 (1982 Ed.).

5. **Criminal Law** ⇐163

Defendant was not placed in double jeopardy because trial court ignored jury's recommendation against death penalty and sentenced him to death, in that trial judge's determination was merely completion of single trial process in which jury recommendation was only an intermediate stage. IC 35-50-2-9 (1982 Ed.); U.S.C.A. Const. Amends. 5, 14.

6. **Courts** ⇐114

A nunc pro tunc entry is an entry made now of something which was actually previously done, to have the effect as of the former date and provide a record of an act or event of which no reference at all was made in the court's order book or which may serve to change or supplement entry already existing in order book.

7. **Courts** ⇐114

Nunc pro tunc entries must be based upon written memoranda, notes, or other memorials which must be found in records of case, must be required by law to be kept, must show action taken or orders or rulings made by court, and must exist in records of court contemporaneous with or preceding date of action described.

8. **Criminal Law** ⇐1181

It was proper to remand criminal prosecution and order trial court to comply fully with death penalty statute where trial court wrongly listed as aggravating circumstances its counterarguments to any possible mitigating circumstances available to the defendant. IC 35-50-2-9 (1982 Ed.).

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APPENDIX A—Continued

(C) Child molesting (IC 35-42-4-3).

(D) Criminal deviate conduct (IC 35-42-4-2).

(E) Kidnapping (IC 35-42-3-2).

(F) Rape (IC 35-42-4-1).

(G) Robbery (IC 35-42-5-1).

(H) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either:

(A) the victim was acting in the course of duty; or

(B) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.

(9) The defendant was:

(A) under the custody of the department of correction,

(B) under the custody of a county sheriff,

(C) on probation after receiving a sentence for the commission of a felony, or

(D) on parole,

at the time the murder was committed.

(10) The defendant dismembered the victim.

(11) The victim of the murder was less than twelve (12) years of age.

(12) The victim was a victim of any of the following offenses for which the defendant was convicted:

(A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.

(B) Kidnapping (IC 35-42-3-2).

(C) Criminal confinement (IC 35-42-3-3).

(D) A sex crime under IC 35-42-4.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c).

APPENDIX A—Continued

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review. *As amended by P.L. 311-1983, SEC. 2; P.L. 120-1985, SEC. 2; P.L. 296-1988, SEC. 2; P.L. 148-1989, SEC. 6; P.L. 1-1990, SEC. 354.*

FAIRMONT HOMES, INC., Plaintiff,

v.

SHRED PAX CORPORATION, Defendant.

No. S90-140.

United States District Court, N.D. Indiana, South Bend Division.

Dec. 28, 1990.

Buyer brought action in state court against manufacturer of industrial shredder alleging breach of warranties, fraud, and breach of contract. Action was removed. Manufacturer moved to dismiss. The District Court, Miller, J., held that: (1) fraud was not pleaded with sufficient particularity warranting dismissal of count without prejudice, and (2) buyer stated cause of action for breach of warranties.

Granted in part and denied in part.

1. **Federal Civil Procedure** ⇐636

To state claim for fraud consistent with Federal Rules of Civil Procedure, plaintiff must identify particular statements and actions and specify why they are fraudulent; conclusory allegations do not satisfy pleading requirements and subject pleader to dismissal. Fed.Rules Civ.Proc. Rule 9(b), 28 U.S.C.A.

2. **Federal Civil Procedure** ⇐636

Under federal rule, allegations of fraud cannot be based on information and belief, except as to matters within opposing party's knowledge, and in latter case, allegations must be accompanied by statement of facts upon which belief is founded. Fed.Rules Civ.Proc. Rule 9(b), 28 U.S.C.A.

3. **Federal Civil Procedure** ⇐636

Although fraud counts which alleged defendant's scienter "on information and belief" may have been sufficient to state claim under procedural rules of Indiana in whose courts counts were initially filed be-

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firmed that the injury to the thigh was a human bite mark.

A few days after Laura Luebbehusen's body was discovered, her Toyota automobile was found about one block away from the Second Chance Halfway House. Defendant Schiro was a resident at the Halfway House, which tried to assist former criminals in finding employment and remove any obstacles that they face when released from prison. It also housed people who were sent there for treatment and counseling in lieu of sending them to prison from the local courts.

The director of the Halfway House, Ken Hood, asked a counselor to check the sign-in and sign-out sheets to see if any of the residents had been out at the time of the Luebbehusen murder. While the counselor was examining the sign-out sheets, Schiro approached him and asked if he could talk about something that was very "heavy." The counselor told Schiro to speak to Ken Hood. Schiro admitted to Hood that he had killed Laura Luebbehusen. Hood contacted the police and took Schiro down to the station.

Jimmy Wolff was Schiro's roommate at the Halfway House. Wolff testified that Schiro arrived at the room about 5:00 a.m., on February 5, 1981, the day Laura Luebbehusen's body was found. Schiro told Wolff he had to go downstairs and straighten things out so he would not get in trouble about being out all night.

After Schiro confessed to Ken Hood, the police searched his room and determined that the blood on a jacket found in the room was consistent with that of the victim, but not consistent with Schiro's blood. While in a holding cell in Vanderburgh County Jail, Schiro told another inmate that he had been drinking and taking Quaaludes the night of the killing, and had intercourse with the victim before and after killing her.

Mary T. Lee, Schiro's girlfriend, testified that shortly after the murder was committed, Schiro visited her in Vincennes and admitted that he killed Laura Luebbehusen. Schiro told Lee that he gained entrance to the victim's home on the pretext that his car had broken down. After pretending to use the telephone to call for assistance, Schiro asked if he could use the bathroom. He came out of the bathroom exposed but told Laura not to be alarmed because he was "gay". This story Schiro made up in order to gain the victim's confidence. Schiro further told Luebbehusen that some "gay" friends had let him that he could not "get it on" with a woman and he just wanted to win the bet. Schiro and Luebbehusen talked about homosexuality and Luebbehusen told Schiro that she, too, was "gay". Darlene Hooper, Luebbehusen's roommate, had testified earlier that Laura was a practicing lesbian and that she had an aversion to men.

Schiro roamed through the house and came back with two dildoes and had Luebbehusen try to insert one into his anus. He found the experience too painful and told Luebbehusen he would make love to her instead. A dildo, identified at trial as the one taken from the house, was recovered in Vincennes. Mary Lee told the police where Schiro had disposed of it after showing it to her. After intercourse, Luebbehusen tried to leave but Schiro stopped her, dragged her back into the bedroom, and raped her. During this time the two had been drinking. When the liquor ran out, they left to buy more and returned to the house. Schiro fell asleep but woke up when Luebbehusen again attempted to leave. Schiro forced her to remain and she fell asleep on the bed. While Luebbehusen slept, Schiro felt the urge to kill her, grabbed the vodka bottle, and beat her on the head until the bottle broke. He then beat her with the iron and when she resisted his attack, finally strangled her to death. Schiro then dragged Luebbehusen into another room, undressed her, and sexually assaulted the corpse.

I

Defendant Schiro's first argument concerns the constitutionality of the Indiana Death Penalty statute, Ind.Code § 35-50-2-9 (Burns Repl.1979). Schiro states specifically that the death penalty does not provide for any proportionality review of death sentences by this Court. According to Schiro, the term "proportionality review" requires that the sentence handed down by the trial court be compared to sentences imposed in similar circumstances. This, Schiro urges, would insure that the death penalty is not arbitrarily and capriciously applied. Since Ind.Code § 35-50-2-9 does not explicitly mandate this form of review and this Court has allegedly failed to engage in such review, Schiro believes that the death penalty statute is unconstitutional.

Schiro admits that two recent cases have upheld the constitutionality of the Indiana death penalty statute. *Williams v. State* (1982) Ind., 430 N.E.2d 759, *appeal dismissed* (1982) ___ U.S. ___, 103 S.Ct. 33, 74 L.Ed.2d 47; *Brewer v. State* (1981) Ind., 417 N.E.2d 889, *cert. denied* (1982) ___ U.S. ___, 102 S.Ct. 3510, 73 L.Ed.2d 1384. *See also Judy v. State*, (1981) Ind., 416 N.E.2d 95. Schiro also notes that the United States Supreme Court, in *Proffitt v. Florida*, (1976) 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, found the Florida death penalty statute, which is nearly identical to our death penalty statute, to be constitutional. *Compare* Ind.Code § 35-50-2-9 (Burns Repl.1979) *with* Fla.Stat.Ann. § 921.141 (West Supp.1982). While conceding that the procedure under our statute may be constitutional, Schiro argues that the following passage from *Proffitt* indicates the Supreme Court's mandate of proportionality review in cases involving the death penalty:

"The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' *State v. Dixon*, 283 So.2d 1, 10 (1973)."

428 U.S. at 250-51, 96 S.Ct. at 2966, 49 L.Ed.2d at 922.

Although Schiro has not raised this argument, and without going into great detail, we feel it is incumbent to note that this Court has consistently held that the death penalty does not violate the ban against cruel and unusual punishment, Article 1, § 16 of the Indiana Constitution. *Brewer, supra*, 417 N.E.2d at 894; *Adams v. State*, (1971) 259 Ind. 64, 74, 271 N.E.2d 425, 430, and cases cited therein. Similarly, the United States Supreme Court has held that the death penalty does not violate the Eighth Amendment of the United States Constitution. *Gregg v. Georgia*, (1976) 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; *Proffitt v. Florida*, (1976) 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; *Jurek v. Texas*, (1976) 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929.

This Court has comparatively analyzed the Florida death penalty statute, approved in *Proffitt, supra*, and our own statute at great length. *Brewer, supra*, 417 N.E.2d at 897; *see also Judy v. State*, 416 N.E.2d at 107. Both statutes require the following prerequisites before a sentence of death may be imposed and executed:

"(1) A conviction of murder.

(2) A hearing for purposes of determining the sentence to be imposed, separate from the trial at which the issue of guilt was determined.

(3) In jury trials, a finding, by the jury, of at least one (1) of the aggravating circumstances enumerated in the statute.

(4) In jury trials, a finding, by the jury, that mitigating circumstances, if any, are outweighed by the aggravating circumstances.

(5) In jury trials, a recommendation by the jury, as to whether or not the death penalty should be imposed.

9. Criminal Law ⇐163

Nunc pro tunc entry of trial court clearly setting out trial court's reasons for imposing death penalty did not violate double jeopardy clause since all that was necessary was that trial court put its findings in proper form, no new determination of sentence was made, no new evidence was presented, and no reweighing of facts took place. IC 35-50-2-9 (1982 Ed.); U.S.C.A. Const.Amends. 5, 14.

10. Criminal Law ⇐994(4)

Nunc pro tunc entry putting trial court's findings with respect to imposition of death sentence in proper form complied with death penalty statute, although defendant contended that trial court did not take jury recommendation into consideration and did not exercise discretion but felt that death sentence was mandatory, where trial court did consider jury's recommendation and entire nunc pro tunc entry illustrated that trial court felt that requirements of law for imposition of death penalty had been satisfied. IC 35-50-2-9 (1982 Ed.).

11. Criminal Law ⇐1134(1)

The Supreme Court would not impose a stricter standard of review in situation where trial court and jury disagreed about imposition of death sentence, since it may have been that jury, which is to be involved in capital case only once, would be reluctant to impose more severe punishment. IC 35-50-2-9 (1982 Ed.).

12. Homicide ⇐354

Death penalty was not arbitrarily or capriciously applied to defendant, who intentionally killed victim while committing or attempting to commit rape, despite record showing that defendant engaged in bizarre sexual perversions at an early age and for some length of time, since evidence, as attested to by psychiatrists, indicated that defendant could have conformed his conduct to the law. IC 35-42-1-1(2), 35-50-2-9 (1982 Ed.).

13. Criminal Law ⇐412.2(3)

Miranda warnings do not have to be given in all interrogations.

14. Criminal Law ⇐518(1)

There was no need to give *Miranda* warnings to defendant where defendant voluntarily talked to director of his halfway house about the crime, defendant was not an object of suspicion, director was only talking to defendant upon his request and, although under rules of the facility, defendant could not leave unless he signed out on authorized business, residents were allowed to move about the facility and its grounds and one door was always left unlocked so that no custodial interrogation took place; thus, defendant's confession did not taint all evidence seized as a result.

15. Searches and Seizures ⇐3.4

Search warrant issued by master commissioner of the Vanderburgh Circuit Court was not invalid due to the Supreme Court's decision in *State ex rel. Smith v. Starke Circuit Court* holding unconstitutional those statutes giving a master commissioner power to exercise full jurisdiction over any probate matters, civil matters, or criminal matters, since power to issue search warrants was not held unconstitutional. IC 33-4-1-74.4(b), 33-4-1-75.1(c), 33-4-1-82.2(a, b) (1982 Ed.).

16. Criminal Law ⇐404(1)

Exhibits must be sufficiently identified to be admissible in evidence.

17. Criminal Law ⇐444

A letter alleged to have been received from a particular source is not admissible until its authenticity, identity, and genuineness have been sufficiently shown.

18. Criminal Law ⇐444, 1036.1(9)

In prosecution for murder while committing or attempting to commit rape, letter, allegedly written by defendant, and delivered by defendant's girl friend to doctor who treated defendant prior to murder for his problem with alcohol and drugs was inadmissible due to lack of authenticity, and any alleged error had been waived because defense counsel failed to resubmit evidence when defendant's girl friend took the stand.

19. Criminal Law ⇐1173.2(1)

There was no reversible error because of omission of verdict forms entitled "guilty of murder while committing and attempting to commit rape but mentally ill" and "guilty of murder while committing and attempting to commit criminal deviate conduct but mentally ill" where defendant failed to request any other verdict forms when situation was first brought to his attention; moreover, jury was informed that mentally ill verdict applied to murder/rape charge and murder/deviate conduct charge as well as murder charge.

20. Criminal Law ⇐986.4(3)

Conclusory language in presentence report which listed certain factors as "aggravating" did not invade province of trial court in determining existence of aggravating and mitigating circumstances under death penalty statute; mere fact that probation officer labeled certain factors as "aggravating" did not imply that trial judge would automatically agree, trial judge scratched the last reference to "aggravating factors," and defendant did not show that any portion of presentence report was illegal or that it should not have been presented to the trial judge.

Michael C. Keating, John D. Clouse, Laurie A. Baiden, Evansville, for defendant-appellant.

Linley E. Pearson, Atty. Gen. of Indiana, Joseph N. Stevenson, Deputy Atty. Gen., Indianapolis, for plaintiff-appellee.

PIVARNIK, Justice.

Defendant-appellant, Thomas N. Schiro, was convicted of Murder While Committing or Attempting to Commit Rape, Ind.Code § 35-42-1-1(2) (Burns Repl.1979), at the conclusion of a jury trial in Brown Circuit Court on September 12, 1981. The trial court sentenced Schiro to death. He now appeals.

Schiro raises seven errors on appeal, concerning:

1) whether the Indiana death penalty statute, Ind.Code § 35-50-2-9 (Burns Repl. 1979), is unconstitutional because it fails to provide for adequate review of death sentences;

2) whether the trial court erred in imposing the death penalty;

3) whether a statement given by Schiro was an involuntary custodial statement and should have been excluded from trial;

4) whether the master commissioner of Vanderburgh Circuit Court had authority to issue search warrants;

5) whether the trial court erred in excluding a letter written by the defendant on the issue of his insanity;

6) whether the trial court supplied the jury with all the necessary verdict forms; and,

7) whether the pre-sentence report contained improper information.

The evidence most favorable to the State reveals that the body of Laura Luebbehusen was discovered in her Evansville home on the morning of February 5, 1981. Laura's roommate, Darlene Hooper, and Darlene's ex-husband, Michael Hooper, discovered the body. Darlene had spent the previous night at Michael's apartment. The two found the home in great disarray, with blood covering the walls and floor. Laura's body was found near the door, her legs spread apart, and her slacks were pulled down around her ankles. The police were called and recovered a large broken vodka bottle, a handle and metal portions of an iron, a partially consumed bottle of wine, a pint bottle of vodka, and empty alcoholic beverage cans and bottles in the garbage.

Dr. Albert Venables testified as the pathologist who performed the autopsy on the victim. Dr. Venables found a number of contusions on the body but he stated that Laura Luebbehusen had been strangled to death. A number of wedge-shaped injuries on the head were most likely caused by a blunt instrument. Dr. Venables also found lacerations on one nipple and a thigh, and a tear in the vagina, all caused after the victim's death. A forensic dentist con-

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"(e) If the [death penalty] hearing is by the jury, the jury shall recommend to the court whether the death penalty should be imposed.

* * * * * *

(2) ...

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation."

Schiro argues that the use of the word "whether" indicates that the sole purpose of the jury at the death penalty hearing is to render a recommendation of death only if it is justified under the facts. The legislative intent would make a jury recommendation of *no* death penalty binding upon the trial court. If the jury did recommend a sentence of death, the legislature also intended that the trial court could behave as a safety valve by overriding such a recommendation and imposing a sentence of years. Thus, Schiro argues, while a trial court may override a recommendation of death, it may not impose the death penalty if the jury holds otherwise.

We wrote in *Foremost Life Ins. Co. v. Dept. of Ins.*, (1980) Ind., 409 N.E.2d 1092, 1095–96:

"In interpreting a statute we are to ascertain and give effect to the intent of the legislature. *State ex rel. Baker v. Grange*, (1929) 200 Ind. 506, 510, 165 N.E. 239, 240; *Ervin v. Review Bd.*, (1977) Ind.App. [173 Ind.App. 592], 364 N.E.2d 1189, 1192; *Abrams v. Legbrandt*, (1974) 160 Ind.App. 379, 388, 312 N.E.2d 113, 118; *Marhoefer Packing Co. v. Indiana Dept. of State Revenue*, (1973) 157 Ind. App. 505, 516, 301 N.E.2d 209, 214.

In determining the legislative intent, the language of the statute itself must be examined, including the grammatical structure of the clause or sentence in issue .... Further, a statute is to be examined and interpreted as a whole, giving common and ordinary meaning to words used in English language and not overemphasizing a strict literal or selective reading of individual words. *Combs v. Cook*, (1968), 238 Ind. 392, 397, 151 N.E.2d 144, 147; *Abrams v. Legbrandt*, *supra*."

[3] The American Heritage Dictionary (1971 ed.) in its definition of "whether" says the word is "[u]sed in indirect questions to introduce one alternative: *We should find out whether the museum is open.*" Using the accepted definition of "whether", we find that under Ind.Code § 35-50-2-9, the jury is mandated to make a choice between the death penalty or no death penalty. Therefore, Schiro's argument, that the statute only allows the jury to recommend the death penalty, fails, and because of this, his assertion that the trial court may only reject death penalty recommendations also fails. We would also note that Schiro's premise (a recommendation against the death penalty is binding upon the trial court) thwarts legislative intent. Ind.Code § 35-50-1-1 (Burns Repl.1979) abolished the jury's role in determining or setting a sentence. *Debose v. State*, (1979) 270 Ind. 675, 676, 389 N.E.2d 272, 273. If we accept Schiro's argument, the trial court would be severely limited in imposing sentence under Ind.Code § 35-50-2-9 whenever a jury voted against the death penalty. Under the defendant's reasoning, the trial court would have no choice but to impose a term of years. Such action goes against the legislative intent of removing the jury's role in sentencing defendants. The jury plays an advisory role under Ind.Code § 35-50-2-9(e) and the trial court may properly override a jury's recommendation.

B

Schiro next argues that he was placed in double jeopardy because the trial court ignored the jury's recommendation and sentenced him to death. Having been given the chance to seek the death penalty before the jury, the State, Schiro urges, should not be given a second chance to litigate the same issues before the trial court. Schiro cites *Bullington v. Missouri*, (1981) 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 in support of his position.

The *Double Jeopardy* Clause of the Fifth Amendment provides,

" ... that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.' The Double Jeopardy Clause was made applicable to the states through the Fourteenth Amendment in *Benton v. Maryland*, (1969) 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707. The Clause has been held to embody three separate but related prohibitions: (1) a rule which bars a reprosecution for the same offense after acquittal; (2) a rule barring reprosecution for the same offense after conviction, and; (3) a rule barring multiple punishment for the same offense. *North Carolina v. Pearce*, (1969) 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656."

Elmore v. State, (1978) 269 Ind. 532, 533–34, 382 N.E.2d 893, 894.

[4, 5] Defendant Schiro's reliance on *Bullington*, *supra*, is misleading. Missouri law explicitly requires the jury, not the trial court, to impose the death penalty in cases tried before a jury. Mo.Ann.Stat. § 565.006 (Vernon 1979). This involves a bifurcated proceeding where, after the defendant is convicted, the prosecution offers evidence in support of the death penalty. This hearing must be held before the same jury that convicted the defendant of murder. The jury must find at least one aggravating circumstance beyond a reasonable doubt and put its findings in writing. A jury's decision to impose the death penalty must be unanimous; if it cannot reach a decision, the alternative sentence of life imprisonment is imposed.

In *Bullington*, the defendant was convicted of murder but the jury fixed his punishment at life imprisonment. While the defendant's motion for a new trial or judgment of acquittal was pending, the United States Supreme Court decided *Duren v. Missouri*, (1979) 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579. That case held that the Missouri law allowing women to be exempted from jury duty deprived a defendant of his right under the Sixth and Fourteenth Amendments to a jury drawn from a fair cross-section of the community. The trial court, relying on *Duren*, granted a new trial for defendant Bullington.

Defendant was again convicted of murder and the State sought the death penalty. The United States Supreme Court held that the second seeking of the death penalty, under the Missouri statute, violated the proscription against double jeopardy. The bifurcated proceeding requires the jury to determine whether the prosecution has proved its case. Analogizing the first jury's decision to impose life imprisonment to that of an acquittal (i.e., the jury could not find an aggravating circumstance beyond a reasonable doubt sufficient to impose a death sentence), and holding, of course, that an acquittal is absolutely final, the Supreme Court wrote that the prosecution is not entitled to another chance at the death penalty. 451 U.S. at 446, 101 S.Ct. at 1861–62, 68 L.Ed.2d at 283.

As the facts illustrate, *Bullington* was a unique decision that is clearly distinguishable from the situation presented here. Prior decisions held that the Double Jeopardy Clause did not prohibit the imposition of a harsher sentence on retrial, *North Carolina v. Pearce*, *supra*, but Bullington found an exception to that rule. The Supreme Court ruled that the Missouri sentencing hearing had the hallmarks of a trial on guilt or innocence. All issues are decided, reduced to written findings, and made binding since the jury's decision is the final determination of the sentence. In Indiana, the jury does not make a final determination of the sentence. It only releases an opinion of its recommendation, not an ultimate determination.

Schiro also argues that the jury's recommendation shows that the State failed to prove an aggravating circumstance beyond a reasonable doubt. This is not necessarily so. The statute does not require the jury to list its reasons for the recommendation. It could well be that a jury found the aggravating circumstance to be present, but felt it was outweighed by mitigating circum-

(6) A finding by the trial court of at least one (1) of the aggravating circumstances enumerated in the statute.

(7) A finding by the trial court that mitigating circumstances, if any, are outweighed by the aggravating circumstances.

(8) The completion, prior to carrying out the sentence, of an automatic expedited review of the imposed sentence by the Supreme Court of the State."

Brewer, 417 N.E.2d at 897.

We also felt in *Brewer* that Indiana is more restrictive than Florida in applying the death penalty. Indiana law requires that the sentencing hearing be before the same jury that tried the guilt issue, whereas Florida may, under certain circumstances, impanel a special jury for the hearing. *Id.* at 896. The standard of proof for a finding of at least one of the aggravating circumstances is beyond a reasonable doubt in Indiana, while Florida does not require a specified standard of proof. *Id.*

Still, regardless of the above distinctions, defendant Schiro would argue that under *Proffitt*, Indiana does not engage in a meaningful appellate review of death sentences. We disagree.

We interpreted the United States Supreme Court's holding in *Gregg v. Georgia*, *supra*, a companion case to *Proffitt*, to be that the death penalty may be applied " ... if the circumstances of the offense and the character of the offender both warrant and if the procedures followed in making the determination are such as reasonably to assure that it was not done arbitrarily or capriciously." *Brewer*, *supra*, 417 N.E.2d at 897.

[1] It is clear that the imposition of the death sentence under Ind.Code § 35-50-2-9 is based upon the nature and circumstances of the crime and the character of the offender being sentenced. *Judy*, *supra*, 416 N.E.2d at 105. Also, this Court has adopted a rule wherein it has exclusive jurisdiction of criminal appeals from judgments or sentences imposing death, life imprisonment, or a minimum sentence of greater than ten years. Ind.R.App.P. 4(A)(7). Therefore, because of statewide jurisdiction over most criminal cases, and always over cases involving the death penalty or life imprisonment, we are confident that through continuous and exclusive review of such cases, no sentence of death will be freakishly or capriciously applied in Indiana.

In addition, rules adopted by this Court govern the appellate review of sentences:

"Rule 1

AVAILABILITY—COURT

(1) Appellate review of the sentence imposed on any criminal defendant convicted after the effective date of this rule is available as this rule provides.

(2) Appellate review of sentences under this rule may not be initiated by the State.

(3) The Supreme Court will review sentences imposed upon convictions appealable to that Court; the Court of Appeals will review sentences imposed upon convictions appealable to the Court of Appeals.

Rule 2

SCOPE OF REVIEW

(1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.

(2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed."

Ind.R.App.Rev.Sen. 1 and 2.

[2] In all cases involving the finding of aggravating circumstances, the sentencing judge must include a statement of the reasons for selecting the sentence he imposes. This enactment, Ind.Code § 35-4.1-4-3 (§ 35-50-1A-3) (Burns Repl.1979), reads as follows:

"SENTENCING HEARING IN FELONY CASES.—Before sentencing a person for a felony the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and call witnesses and otherwise to present information in his own behalf. The court shall make a record of the hearing, including:

(1) A transcript of the hearing;

(2) A copy of the presentence report; and

(3) If the court finds aggravating circumstances or mitigating circumstances a statement of the court's reasons for selecting the sentence that it imposes."

The above statute insures that in all instances where the death penalty is applied, the trial court judge must submit written findings indicating the aggravating factors he found to be present in imposing a sentence of death. This will guard against the influence of improper factors at the trial level and will make sure that the evils of *Furman v. Georgia*, (1972) 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, "arbitrary and capricious application" of the death penalty, were not present in the sentencing decision.

Not only do the trial court judge's written findings facilitate meaningful appellate review, this review is guaranteed to be thorough and adequate since we have before us the entire record of the proceedings, not just the sentencing hearing. *Brewer*, *supra*; *Judy*, *supra*. Thus, examination of the record, plus the sentencing hearing and the trial court's findings, protects each individual's constitutional rights.

Therefore, because of procedure mandated by statute, codified by rules, and controlled by cited precedent,

" ... this Court can then meaningfully and systematically review each case in which capital punishment has been chosen, in light of other death penalty cases. Mandatory review by this Court, in each case, of the articulated reasons for imposing the death penalty, and the evidence supporting those reasons, assures 'consistency, fairness, and rationality in the evenhanded operation' of the death penalty statute. *Proffitt v. Florida*, *supra*, 428 U.S. at 259–60, 96 S.Ct. at 2970, 49 L.Ed.2d at 927. *See Gregg v. Georgia*, (1976) 428 U.S. 153, 194–95, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859, 886–87. *Cf. Woodson v. North Carolina*, [428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944], *supra*; *French v. State*, [266 Ind. 276, 362 N.E.2d 834], *supra*. The guidelines and procedures established by our constitution, statutes, and rules thus permit an 'informed, focused, guided, and objective inquiry' by all concerned into the appropriateness of capital punishment in a given case. Therefore, we find our death sentencing procedures to be consistent and in full compliance with those required by the United States Supreme Court in *Gregg v. Georgia* and *Proffitt v. Florida*, and thus not violative of the Eighth and Fourteenth Amendments to the United States Constitution."

Judy, *supra*, 416 N.E.2d at 108.

We find no constitutional infirmities in the death penalty statute nor in the review that automatically follows the imposition of such sentence.

II

The next issue concerns the trial court's imposition of the death penalty. Defendant Schiro's argument may be divided into four sub-categories:

A. Whether Ind.Code § 35-50-2-9 permits a trial court to override a jury's recommendation that the death penalty not be imposed;

B. Whether the procedure established by Ind.Code § 35-50-2-9 places a defendant in double jeopardy;

C. Whether the imposition of the death penalty failed to conform to Ind.Code § 35-50-2-9; and,

D. Whether this Court, after reviewing the case at hand, should vacate the sentence of death.

A

Schiro's first dispute is with the following language found in Ind.Code § 35-50-2-9:

been satisfied. Perusal of the record shows that after careful consideration, the death penalty was deserved and justified. The language of the trial court may appear awkward but nowhere has the trial court or this Court attempted to apply anything resembling a mandatory death penalty. The *nunc pro tunc* entry complies with Ind.Code § 35-50-2-9.

D

In this last sub-paragraph of Issue II, Schiro urges this Court to overturn the death penalty. The main basis for his contention is that the trial court rejected the jury's recommendation that no death penalty be imposed. Schiro believes this Court should impose a stricter standard of review in situations where the trial court and jury disagree about the imposition of a sentence of death.

It is true that in *Gregg v. Georgia*, *supra*, the United States Supreme Court spoke of the important society function fulfilled by jury sentencing. 428 U.S. at 181-82, 96 S.Ct. at 2929, 49 L.Ed.2d at 879. But on the same day, in a companion case, *Proffitt v. Florida*, *supra*, the Supreme Court pointed out that it

> "has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced at sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

428 U.S. at 252, 96 S.Ct. at 2966, 49 L.Ed.2d at 929.

[11] In Issue I, we discussed the great care and scrutiny that goes into the review of all death penalty cases. While we agree that a jury plays a very important and necessary role in our judicial system, we are loath to institute a higher degree of scrutiny in situations where the trial court and jury disagree about the imposition of the death penalty. Trial courts are presumed to know and understand the law. We have as great a confidence in the trial court's function in our judicial system as we do in the function of the jury. It may be that a jury which is to be involved in a capital case only once would be reluctant to impose this most severe form of punishment. This is not to say that all juries would be reluctant to do so, nor that trial courts are more callous and more inclined to impose a sentence of death. Rather, the trial court, with more experience in the criminal system, has better knowledge with which to compare the facts of this case with that of other criminal activity. This should result in greater consistency in sentencing. Furthermore, this Court, using the existing standards for appellate review of sentences, will ensure that the death penalty is not imposed where it is unreasonable to do so. We will not engage in a different standard of review where jury and trial court disagree.

After disposing of the defendant's four separate sub-categories, we now turn to examine whether the sentence of death is appropriate. The transcript of the sentencing hearing and the trial court's written findings show that the court found that Schiro intentionally killed Laura Luebbehusen while committing or attempting to commit rape. After examining the record, we agree with the trial court's findings. Mary Lee and Dr. Frank Osanka recounted the events as told to them by Schiro. Schiro saw the victim a couple of times prior to the day of the murder. He made up his mind that he would rape her and perform his "ritual." After work, Schiro pretended that his car broke down and thus gained access to Luebbehusen's apartment by requesting assistance. Once inside, Schiro persuaded her that he was homosexual but they eventually had intercourse. Dr. Osanka said he was not certain but he was almost positive that the victim was coerced into such activity. Schiro then attempted to get the victim in a comatose or drowsy state by having her consume alcohol and pills. One of his fantasies was to work in a funeral parlor and make love to the bodies of dead women. Sometime during this

process Schiro fell asleep but awakened when the victim tried to escape. He grabbed her, pulled her back in, and raped her. Later they left to purchase some alcohol and then returned, at which time Schiro raped the victim again.

Schiro fell asleep on the couch but awoke when the victim again tried to escape. This time Luebbehusen was fully dressed. Schiro forced her to lie down on the bed beside him. He believed that she fell asleep or passed out. At that point he decided to kill her. Grabbing a vodka bottle, he smacked it against her head and it broke. Luebbehusen started to protest but Schiro grabbed an iron and continued to beat her. Finally, he grabbed the victim around the neck and strangled her. Schiro then began his "ritual." He dragged the corpse into another room, undressed it, and sexually and sadistically assaulted it.

As for the mitigating factors, the trial court did not find any. The court found that the defendant had been engaged in numerous instances of prior criminal conduct. Psychiatrists testified to Schiro's numerous rapes and other criminal deviate conduct. Mary Lee testified about Schiro's sadistic assaults on her child. Another witness testified that Schiro raped her in the presence of her child. Although the defendant related instances of sexual perversion, sadism, necrophilia, exhibitionism, and voyeurism, both of the court-appointed psychiatrists felt that Schiro was in good contact with reality. Both men testified that Schiro was not insane, showed no remorse, was violent and sadistic, and both thought him to be a danger to the community.

The trial court said the defendant attempted to conceal his crime, thereby showing his appreciation for the wrongfulness of his conduct. The court also thought Schiro tried to delude the jurors into thinking he was mentally unstable by rocking back and forth only in their presence. The trial court failed to find that Schiro's age, twenty years, was a mitigating factor.

[12] We find that with the submission of the *nunc pro tunc* entry the trial court properly followed the required procedures in imposing the death sentence. The record justifies the finding of the aggravating circumstances that Thomas Schiro intentionally killed Laura Luebbehusen. Although the record shows that Schiro engaged in bizarre sexual perversions at an early age and for some length of time, we also find that the evidence, as attested to by psychiatrists, indicated he could have conformed his conduct to the law. Such pitiful behavior should not serve as an excuse for the atrocious acts in this matter. The facts in the record, which show the horrifying nature of this rape/murder and the character of this offender, and the compliance of the trial court with the procedures of Ind.Code § 35-50-2-9, lead us to conclude that the death penalty was not arbitrarily or capriciously applied, and is reasonable and appropriate. The trial court is affirmed in the imposition of the death penalty.

III

Schiro argues on appeal that the statement he gave to Ken Hood, in which he admitted killing Laura Lubbehusen, should have been suppressed at trial. He claims that his confession was the result of a custodial interrogation and Ken Hood failed to give *Miranda* warnings prior to Schiro's statement. Schiro also argues that the illegal statement taints all evidence seized as a result of his confession. Such evidence would include Mary Lee's testimony because the police were directed to her through the statement, and objects taken from Schiro's room. Schiro feels that this evidence should have been excluded from the trial.

[13] *Miranda* warnings, *Miranda v. Arizona*, (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, do not have to be given in all interrogations. In *Johnson v. State*, (1978) 269 Ind. 370, 375-76, 380 N.E.2d 1236, 1240, this Court wrote:

> "It is settled that the procedural safeguards of *Miranda* only apply to what the United States Supreme Court has termed 'custodial interrogation.' *Oregon v. Mathiason* (1977) 429 U.S. 492, 97 S.Ct. 711,

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stances. The judge's determination is based on the same standards as the jury's recommendation and he determines whether the aggravating circumstances has been proved beyond a reasonable doubt. His findings are put in writing so that we may adequately review them on appeal. The judge's determination was the completion of a single trial process of which the jury recommendation was only an intermediate stage. We find no error in the procedure used by the trial court in rejecting the jury's recommendation.

C

The original findings in this action did not set out clearly and properly the trial court's reasons for imposing the death penalty. We ordered the trial court to make written findings in this case, setting out the aggravating circumstance proved beyond a reasonable doubt and the mitigating circumstances, if any, as specified in Ind.Code § 35-50-2-9. At the same time we afforded defendant Schiro the opportunity to file a brief contesting the *nunc pro tunc* entry of the trial court. The State was given the opportunity to oppose the defendant's brief. In the brief, Schiro argues that the *nunc pro tunc* entry is inappropriate; that he has been twice placed in jeopardy; and that the *nunc pro tunc* entry does not comply with Ind.Code § 35-50-2-9.

[6, 7] The State counters Schiro's first argument by contending that the *nunc pro tunc* entry simply restates the trial court's findings so that they conform with the requirements of Ind.Code § 35-50-2-9. A *nunc pro tunc* entry is

> "'an entry made now of something which was actually previously done, to have effect as of the former date.' *Perkins v. Hayward*, (1892) 132 Ind. 95, 31 N.E. 670. Such entries may provide a record of an act or event of which no reference at all is made in the court's order book, as was the case in *Neuenschwander v. State*, (1928) 200 Ind. 64, 161 N.E. 369, and *Warner v. State*, (1924) 194 Ind. 426, 143 N.E. 268, or they may serve to change or supplement an entry already existing in the order book as was the case in *Apple v. Greenfield Banking Co.*, (1971) 255 Ind. 602, 266 N.E.2d 13, and *Perkins v. Hayward*, *supra*. Such entries must be based upon written memoranda, notes, or other memorials which (1) must be found in the records of the case; (2) must be required by law to be kept; (3) must show action taken or orders or rulings made by the court; and (4) must exist in the records of the court contemporaneous with or preceding the date of the action described. *Blum's Lumber & Crating, Inc. v. James et al.*, and *State ex rel. Buertich v. Perry County Council et al.*, (1972) 259 Ind. 220, 285 N.E.2d 822; *O'Malia v. State*, (1934) 207 Ind. 308, 192 N.E. 435; *Schoonover v. Reed*, (1879) 65 Ind. 313; *Pittsburgh etc. R. Co. v. Lamm*, (1916) 61 Ind.App. 389, 112 N.E. 45."

Stowers v. State, (1977) 266 Ind. 403, 410-11, 368 N.E.2d 978, 983. There has been precedent for *nunc pro tunc* entries in death penalty cases. In *Judy v. State*, *supra*, the record of the proceedings did not contain the written findings required in death penalty cases. The case was remanded and the trial court was instructed to enter written findings made *nunc pro tunc* effective the date of the sentencing hearing. Such actions are also common in cases involving enhanced sentences where the trial court does not comply fully with the mandate of *Gardner v. State*, (1979) 270 Ind. 627, 388 N.E.2d 513. *See e.g., Alleyn v. State*, (1981) Ind., 427 N.E.2d 1095. We request this specificity upon review so that

> "we [may] fulfill our responsibility to review the trial court's exercise of its judicial discretion. The trial court's statement is important also because it further serves to enlighten the defendant and the community as to the trial court's reasons for the imposition of an enhanced sentence, thereby greatly bolstering the public's confidence in the fairness and justice of our State's judicial process."

Spinks v. State, (1982) Ind., 437 N.E.2d 963, 968.

In a recent case, *Ehlinger v. Oklahoma*, (1982) 455 U.S. 104, 102 S.Ct. 869, 71

L.Ed.2d 1, the United States Supreme Court remanded a death penalty case to the Oklahoma Court of Criminal Appeals. The trial court had refused to consider, as a matter of law, the defendant's character and record of family history as a possible mitigating factor. The Supreme Court ruled that this was error and vacated the death sentence but at the same time remanded the case to the Oklahoma courts. It was made very clear that the Supreme Court would not weigh this evidence of family background; that was the role for the Oklahoma courts. Thus, the death penalty could be reinstated on remand if the Oklahoma courts found that the defendant's background was not sufficient to outweigh imposition of the death sentence.

[8] We also found it proper to remand this cause and order the trial court to comply fully with the death penalty statute. We did not demand a new decision; instead, we simply requested that the trial court provide its reasons for the harsher sentencing and these particular findings must be in the proper form. Only then may we adequately review the imposition of the death sentence. Ind.Code § 35-50-2-9 lists only nine aggravating circumstances which may be used in seeking the death penalty. In this case, it appears that the trial court listed wrongly as aggravating circumstances its counter-arguments to any possible mitigating circumstances available to the defendant. Thus, to ensure fairness to both sides, and to make certain that proper considerations were utilized by the trial court in imposing sentence, we felt that remanding the case so that the written findings conform with the death penalty statute was the proper remedy.

[9] In support of his double jeopardy argument, defendant Schiro again cites *Bullington*, *supra*, Issue IIB. Without going into great detail, we determined above that *Bullington* is not controlling on this matter. Here a judgment of death had been entered. All we requested was that the trial court put its findings in the proper form. No new determination of sentence was made, no new evidence was presented, and no reweighing of the facts took place. We fail to see how double jeopardy attached by remanding this cause for compliance with Ind.Code § 35-50-2-9.

[10] Finally, Schiro argues that the *nunc pro tunc* entry does not comply with Ind.Code § 35-50-2-9 for two reasons: first, the trial court did not take the jury's recommendation into consideration; and, second, that the trial court did not exercise any discretion but instead felt that the death sentence had to be mandatorily imposed.

Ind.Code § 35-50-2-9(e) reads that the "[trial] court shall make the final determination of the sentence, after considering the jury's recommendation . . . ." Schiro insists that the trial court failed to do this. An examination of the *nunc pro tunc* entry, however, reveals just the opposite. The trial court specifically stated that the jury had unanimously recommended that the death penalty not be imposed. Thus, the trial court was aware and cognizant of the jury's recommendation. Later, the trial court stated that the defendant continually "rocked" only in the jury's presence, and that this "fact may well have influenced and misled the jury in its recommendation." It is evident that the trial court did consider the jury's recommendation.

Schiro also takes issue with a passage in the *nunc pro tunc* entry. After carefully weighing all the mitigating circumstances, the trial court stated that "the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law." Schiro argues that this makes for a mandatory imposition of the death penalty.

The imposition of a mandatory death penalty is contrary to constitutional considerations. *Woodson v. North Carolina*, (1976) 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944; *French v. State*, (1977) 266 Ind. 276, 362 N.E.2d 834. The entire *nunc pro tunc* entry illustrates that the trial court felt that the requirements of the law, which calls for the death penalty only after strict consideration of all possible mitigating circumstances, had

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fendant Schiro argues that the objection should have been overruled because the exhibit was relevant, material, and competent evidence, and was not in violation of any rules of evidence.

[16, 17] In the appellate brief, Schiro also argues that the letter should have been admitted because a plea of insanity "opens wide the door to all evidence relating to the defendant and his environment." *Wilson v. State*, (1966) 247 Ind. 454, 461, 217 N.E.2d 147, 151. This is true but exhibits must be sufficiently identified to be admissible in evidence. *D.H. v. J.H.*, (1981) Ind.App., 418 N.E.2d 286; *Leslie v. Ebner*, (1918) 67 Ind. App. 32, 118 N.E. 829. A letter alleged to have been received from a particular source is not admissible until its authenticity, identity, and genuineness have been sufficiently shown. 13 I.L.E. *Evidence* § 162 (1959); 29 Am.Jur.2d *Evidence* § 879 (1967).

[18] Dr. Abendroth said he could recognize Schiro's handwriting, probably because he received three or four prior letters from Schiro, but never explained how he knew the letters were actually written by Schiro. Defense counsel never asked Abendroth if he saw Schiro write the letters or if Schiro personally delivered them and said they were written by him. This lack of authentication was the basis for the trial court sustaining the objection to the letter's introduction. Mary Lee, not Schiro, delivered the letter to Dr. Abendroth. Due to this fact, defense counsel could have had Mary Lee authenticate the letter when she testified later in the trial, but defense counsel failed to do this. We find that in addition to the lack of authenticity, any alleged error on this issue has been waived because defense counsel failed to resubmit the evidence when Mary Lee took the stand.

VI

When the jurors were ready to begin their deliberations, the trial court gave them the following verdict forms:

1) Guilty of Murder as charged in Count I
2) Guilty of Murder/Rape as charged in Count II
3) Guilty of Murder/Deviate Conduct as charged in Count III
4) Guilty of Voluntary Manslaughter
5) Guilty of Involuntary Manslaughter
6) Not guilty
7) Not responsible by reason of insanity
8) Guilty of Murder but mentally ill
9) Guilty of Voluntary Manslaughter but mentally ill
10) Guilty of Involuntary Manslaughter but mentally ill

The Guilty of Murder/Rape verdict was returned on September 12, 1981. The jury was allowed to go home and was instructed to return on September 15 for the penalty phase of the trial. Before the jury returned on the 15th, defense counsel made a motion to reject the verdict because two verdict forms were not submitted to the jury. After some discussion this motion was denied and the penalty phase of the trial began. On appeal, defendant Schiro argues that it was reversible error to omit the following forms: Guilty of Murder while committing and attempting to commit rape but mentally ill; and Guilty of Murder while committing and attempting to commit Criminal Deviate Conduct but mentally ill.

In *Himes v. State*, (1980) Ind., 403 N.E.2d 1377, 1382, this Court wrote:

> "We have previously held that when the jury was permitted to retire without sufficient forms of verdict, the number of forms submitted cannot be considered as reversible error where the record does not show that the accused tendered or requested any other forms. *Bowman v. State*, (1934) 207 Ind. 358, 192 N.E. 755; *Kirkland v. State*, (1956) 235 Ind. 450, 134 N.E.2d 223."

[19] An examination of the hearing on the September 15th motion reveals that the trial court originally raised the question of insufficient verdict forms. At that time defense counsel did not request that any additional verdict forms be submitted but apparently changed his mind a few days later. Thus, we find no reversible error because defendant failed to request any other verdict forms when the situation was first brought to his attention. *Himes, supra*.

The trial court also mentioned that Defendant's Instruction 3 informed the jury that the verdict of guilty but mentally ill was submitted to them on all counts of the information. Thus, the jury was informed that the mentally ill verdict applied to Guilty of Murder/Rape and Guilty of Murder/Deviate Conduct, as well as Guilty of Murder. Defendant has failed to show any prejudice on this issue. *Johnson v. State*, (1982) Ind., 432 N.E.2d 408, 405. There is no reversible error on this issue.

VII

[20] Finally, defense counsel moved to strike a portion of the presentence report which listed certain factors as "aggravating." Defendant Schiro feels that this conclusory language invades the province of the trial court in determining the existence of aggravating and mitigating circumstances under Ind.Code § 35-50-2-9. The presentence report recommended that Schiro receive a severe penalty. Defendant moved to have the recommendation section removed from the report, but was overruled by the trial court, although it did delete one sentence which characterized various factors as aggravating circumstances.

Ind.Code §§ 35-4.1-4-9, -10 (35-50-1A-9, -10) (Burns Repl.1979) provide for the making of a pre-sentence report in order to assist the judge in sentencing. Some factors the probation officer may take into account include "the convicted person's history of delinquency or criminality, social history, employment history, family situation, economic status, education and personal habits." Ind.Code § 35-4.1-4-10 (35-50-1A-10). Furthermore, this Court wrote in *Lotte v. State*, (1980) Ind., 406 N.E.2d 632, 640:

> "[T]he Court of Appeals held [in *Halligan v. State*, (1978) 176 Ind.App. 472, 375 N.E.2d 1151] that the pre-sentence investigation and report may include any matter which the probation officer deems relevant to the question of sentence. These matters obviously could be in favor of or against the defendant and are presented in the report as a finding or an opinion of the probation officer. The defendant is, of course, given the opportunity to rebut any and all of these matters. . . . The United States Supreme Court has stated that it is essential for a sentencing judge to be as well informed as possible concerning the defendant's life and characteristics in order to select an appropriate sentence. The Court further stated that:' . . . modern concepts individualizing punishment have made it all the more necessary to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.' *Williams v. New York*, (1949) 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337, 1343."

Schiro was given the opportunity to refute the allegations made in the report. It appears that Schiro had a "personality conflict" with the probation officer because she was a woman and he also contested portions of the report wherein he admitted making false statements in order to receive leniency for earlier crimes. The sentencing judge listened patiently to everything Schiro had to say and then gave his decision. Trial court judges are presumed to know and understand the laws of this state. The mere fact that the probation officer labeled certain factors as "aggravating" does not imply that the judge would automatically assume that this is so. As the record shows, the trial judge did scratch the last reference to "aggravating factors." Defendant Schiro has not shown that any portion of the pre-sentence report was illegal or that it should not have been presented to the trial judge.

We affirm the trial court in all matters and in the imposition of the death penalty. This cause is remanded to the trial court for the purpose of setting a date for the death sentence to be carried out.

GIVAN, C.J., and HUNTER, J., concur.

50 L.Ed.2d 714; *Bugg v. State*, (1978) Ind., [267 Ind. 614] 372 N.E.2d 1156, 1158. Custodial interrogation refers to questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Mathiason, supra*, 429 U.S. at 494, 97 S.Ct. at 711, 50 L.Ed.2d at 719. The concept of custodial interrogation does not operate to extend the *Miranda* safeguards to spontaneous voluntary statements, i.e. statements which are either not made in response to questions posed by law enforcement officers while the defendant is in custody, *Bugg v. State, supra*, or statements which are made before the officers are given an opportunity to administer the *Miranda* warnings. *New v. State* (1970) 254 Ind. 307, 259 N.E.2d 696."

Schiro argues that Ken Hood was a law enforcement officer who interrogated him in Hood's office. The State strongly argues that Hood, as director of the Second Chance Halfway House, was not a law enforcement officer and no interrogation took place. Both parties have cited other jurisdictions in support of their view on Hood's law enforcement status. We do not find it necessary to determine whether Hood was a law enforcement officer, although Hood stated that he had no ties to any law enforcement agency, was not a sworn peace officer, and was not responsible for the investigation of any criminal activity. From the facts presented in this case, our first point of inquiry is to determine whether a "custodial interrogation" took place. Cases from both the United States Supreme Court and this Court have stated that *Miranda, supra*, does not apply outside the inherently coercive custodial interrogation for which it is designed. *Roberts v. United States*, (1980) 445 U.S. 552, 560, 100 S.Ct. 1358, 1364, 63 L.Ed.2d 622, 631; *Smith v. State*, (1981) Ind., 419 N.E.2d 743, 747. We examine all the facts to determine whether custodial interrogation took place.

A perusal of the record covering the suppression hearing and Hood's testimony at trial reveals the following. On the day in question, Schiro approached his work release counselor, a Mr. Williamson, and said that he had something "heavy" to discuss. Williamson was busy checking the sign-in, sign-out sheets to see whether any of the residents were out of the building during the time Laura Lubbehusen was murdered. Williamson was doing this under Hood's direction. Hood stated that while he did not think any of the residents were involved in the murder, he was afraid adverse publicity might arise because the victim's car was found near the Second Chance Halfway House. Therefore, he wanted to counter any possible bad publicity by showing that all the residents were in the facility when the crime occurred. Williamson thought Schiro's problem concerned his alcoholism and said that if it was serious, Schiro should go see Hood. Williamson called Hood and told him Schiro was on his way to discuss a problem.

Hood stated that he and the staff are strictly concerned in treating the individual resident's problems. In fact, Schiro had been in his office earlier that day and they discussed transferring him to another facility where Schiro could receive better treatment for his drinking problem. When Schiro arrived, Hood said he seemed nervous and upset but did not appear to be under the influence of alcohol or drugs. After ascertaining that Schiro's alcoholism was not the reason for this conversation, Hood started asking Schiro general questions. Hood felt that Schiro wanted to talk but appeared uncertain as to what he wanted to discuss. Hood thought that some general questions might calm him down. Although Hood said every indication was against it, he finally asked Schiro if he drove the victim's car and parked it near the facility. When Schiro nodded affirmatively, Hood told him he did not believe him because the records indicated that Schiro had been in the facility when the crime took place. Schiro said that the night watchman or manager had falsified the sign-in sheet. Still disbelieving, Hood asked some more questions about the murder. When Schiro mentioned that he worked near the victim's apartment, and Hood knew this to be true, Hood finally believed Schiro was responsible for the murder. Flabbergasted, Hood telephoned a judge for assistance. Schiro's attorney was in the judge's chambers and told Schiro to avoid saying anything about the crime. Hood then escorted Schiro to the police station.

[14] We do not find that these facts show a custodial interrogation took place. Schiro voluntarily wanted to talk to someone about this crime. He was not the object of suspicion by Hood or anyone else, and Hood was only talking to Schiro upon Schiro's request. Schiro argues that under the rules of the facility, he could not leave unless he signed out on authorized business. Thus, he feels that he was in custody anywhere in the building. Hood stated that the residents could move about the facility at their leisure, stroll the grounds, and one door was always left unlocked. Regardless, Hood also said that he was not keeping Schiro in his office and he was free to leave at any time. Schiro was never placed in physical custody or restrained in any way. Schiro approached Hood, not vice versa. We fail to see that Schiro was coerced, either blatantly or inherently, into making a confession. There was no need for *Miranda* warnings from Hood.

Due to the disposition of the above issue, we also hold that Schiro's confession does not taint all evidence seized as a result of his statement. Therefore, Mary Lee's testimony and evidence taken from Schiro's room were properly admitted at trial.

IV

[15] Defendant Schiro argues that the search warrant issued by Maurice O'Connor, acting as Master Commissioner of the Vanderburgh Circuit Court, is invalid due to this Court's decision in *State ex rel Smith v. Starke Circuit Court*, (1981) Ind., 417 N.E.2d 1115. Due to the alleged defective nature of the search warrant, which was State's Exhibit 45, Schiro argues that all evidence seized because of the search warrant, such as his blood-stained coat, should not have been introduced at trial.

Defendant Schiro is in error on this issue. *State ex rel. Smith v. Starke Circuit Court* dealt with statutes providing for appointment of commissioners by circuit courts of Starke, Vanderburgh, and St. Joseph counties. The opinion was handed down on March 23, 1981, and we held that the holding shall have only prospective application and shall apply to or affect only those cases which had not yet reached final judgment or had not yet had a ruling on the motion to correct errors. *Id.*, 417 N.E.2d at 1124. The search warrant in this cause was issued in February, 1981, and the trial began in September, 1981; therefore, Schiro is correct in stating that his pending trial fell within the ambit of the opinion's prospective application. However, we declared only the following sections to be unconstitutional: Ind.Code § 33-4-1-74.4(b); 33-4-1-82.2(b); and 33-4-1-75.1(c) (Burns Supp. 1980). Those sections gave the master commissioner power to exercise full jurisdiction over any probate matters, civil matters, or criminal matters, but we did not hold the power to issue search warrants to be unconstitutional. The statute for Vanderburgh county states in pertinent part that the "master commissioner may conduct preliminary hearings in criminal matters and issue search warrants and arrest warrants and fix bond thereon, and he may enforce court rules." Ind.Code § 33-4-1-82.2(a) (Burns Supp.1982). The search warrant was properly issued and evidence seized was properly introduced at trial.

V

Dr. Walter Abendroth was called by the State to testify about defendant Schiro's mental state. Dr. Abendroth had been treating Schiro prior to the murder. Most of this treatment dealt with Schiro's problem with alcohol and drugs. On cross-examination, the defense attempted to introduce a letter, allegedly written by Schiro, which Mary Lee delivered to Dr. Abendroth. The State objected on lack of foundation of Abendroth's ability to authenticate the letter as one written by Schiro. The trial court sustained the objection. De-

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one of those same questions of fact in a manner contrary to the manner in which the jury resolved it. Under our legal tradition, the determination of fact by a jury in favor of the defendant in a criminal case is not subject to being resolved at a later date by a judge in such a manner as to place the defendant in a worse position.

In the case of *United States v. DiFrancesco*, (1980) 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328, it is said:

"The exaltation of form over substance is to be avoided. The Court has said that in the double jeopardy context it is the substance of the action that is controlling, and not the label given that action." 449 U.S., at 142, 101 S.Ct., at 440.

Here the statutory label is "recommendation". The substance beneath it is a factual adjudication and moral judgment of the jury, not a court master, not a court commissioner, but a jury of twelve, that the human qualities which warrant imposition of the death penalty are not present in Thomas N. Schiro. This favorable jury determination was awarded in a fair and open adversarial confrontation with the prosecutorial forces of the State. Since that award came from a jury after a full-blown trial, a judge, applying the same rational and specific standards as the jury was required to use, cannot, consistent with the protection of the guarantee against double jeopardy, upon making contrary factual findings, take it away.

II.

The nunc pro tunc entry of the judge first notes that the verdict of the jury finding appellant Schiro guilty of murder while committing or attempting the crime of rape as charged in Count II was returned to court on September 13, 1981. The jury reconvened on September 15, 1981 and a death sentence hearing was held pursuant to Ind.Code § 35-50-2-9 resulting that day in a recommendation that the death penalty not be imposed. It further reflects a sentencing hearing was held on October 2, 1981, and continues in part pertinent to the judge's final determination that the sentence of death be imposed:

"On October 2, 1981, this Court having reviewed the evidence of the trial and having considered the written pre-sentence report, and having heard the arguments of counsel and the statement of the Defendant, gives the following reasons for the imposition of its death sentence.

These are the aggravating circumstances which the State has proved beyond a reasonable doubt. Under Indiana Code, Section 35-50-2-9, Subsection [1] The Aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

1. The verdict of the jury on September 12, 1981, found the Defendant Thomas N. Schiro guilty of Murder while committing and attempting statutory rape.

2. The jury rejected the plea of insanity by its verdict.

Since aggravating circumstances were proven beyond a reasonable doubt, it remains to consider whether any mitigating circumstances exist and outweigh the aggravating circumstances.

As for mitigating circumstances, the Court finds none. Under Indiana Code § 35-50-2-9, subsection (c) the mitigating circumstances that may be considered under this section are as follows: "

At this point in the entry, the judge notes each mitigating circumstance and upon consideration of evidence rejects each possibility. After proceeding through that, the entry continues:

"Since the State proved 'beyond a reasonable doubt that existence of at least (1) of the aggravating circumstances alleged', (Indiana Code § 35-50-2-9, Section 9[9]) and the Court finds no mitigating circumstances to outweigh it, the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.

The Defendant is to be executed, as by law provided, on the 28th day of January, 1982, before sunrise."

Indiana Code § 35-50-2-9, the death sentence statute, provides in pertinent part as follows:

"(a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in subsection (b) of this section. *In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances alleged.*

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

* * * * * *

(c) The mitigating circumstances that may be considered under this section are as follows:

* * * * * *

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c) of this section.

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation." (Emphasis added.)

Indiana Code § 35-50-2-9(e)(2) requires the sentencing judge to make the final determination of whether the death penalty should be imposed "based upon the same standards that the jury was required to consider." The standards referred to are the two listed in the same paragraph of the statute, the first of which is:

"(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and"

The aggravating circumstance alleged in Count IIA is as follows:

"(1) The murder of Laura Luebbehusen charged in Count II was intentionally committed by the defendant, Thomas N. Schiro, during the commission of the crime of Rape, as more particularly described in the Information. "

According to the requirements of these provisions, it was necessary for the sentencing judge to *personally* conclude as a trier of fact that the State, at the sentencing hearing before the jury, proved to a moral certainty beyond a reasonable doubt that Thomas Schiro strangled and thus killed Laura Luebbehusen while committing or attempting to commit a rape upon her, and at the time his mind had formed the *mens rea* identified by Ind.Code § 35-41-2-2 as "intentional", i.e., that he had had a conscious objective to strangle and kill. I can

DeBRULER, J., concurring and dissenting with separate opinion.

PRENTICE, J., concurring and dissenting with separate opinion.

DeBRULER, Justice, concurring and dissenting.

Following the jury sentencing hearing, the jury, after deliberating for one hour, returned a unanimous recommendation that the death penalty not be imposed. Two weeks later at the judge sentencing hearing, the judge overrode that recommendation and sentenced appellant to die. The conviction should be affirmed, but several independent legal grounds exist which require the penalty of death to be vacated.

I.

Upon considerations going to the meaning and spirit of the Double Jeopardy Clause of the Fifth Amendment and the like provision of the Indiana Constitution, Art. 1, § 14, a sentencing judge cannot be permitted to override a jury recommendation of no death penalty arrived at pursuant to the death sentence statute, Ind.Code § 35-50-2-9. A jury verdict of not guilty on the issue of guilt or innocence is absolutely beyond the authority of judges to override. *Fong Foo v. United States*, (1962) 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629. This fixed and unyielding characteristic of the jury verdict of acquittal exists by reason of the pronouncements of courts that the Double Jeopardy Clauses require it to exist. No state statute or act of Congress can change this. Only a constitutional amendment could do so. Justice Blackmun for the United States Supreme Court in *Bullington v. Missouri*, (1981) 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270, in referring to the immutability of the verdict of acquittal states:

"The values that underlie this principle, stated for the Court by Justice Black, are equally applicable when a jury has rejected the State's claim that the defendant deserves to die.

'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.' *Green v. United States*, 355 U.S. [184], at 187–188, 78 S.Ct. [221], at 223–224 [2 L.Ed.2d 199].

See also *United States v. DiFrancesco*, 449 U.S. [117], at 136, 101 S.Ct. [426], at 437 [66 L.Ed.2d 328]. The 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,' *id.*, at 130, 101 S.Ct., at 433, thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment. Missouri's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the State, not the defendant, that should bear 'almost the entire risk of error.' *Addington v. Texas*, 441 U.S. [418], at 424, 99 S.Ct. [1804], at 1808 [60 L.Ed.2d 323]." 451 U.S. at 445–446, 101 S.Ct. at 1861–1962.

That court went on to announce that the sentencing proceeding before the Missouri jury was like the trial on the question of guilt or innocence, and that as a consequence thereof, a resultant jury rejection of the death penalty, by reason of the Double Jeopardy Clause has the same immutable characteristic as the jury verdict of not guilty. Appellant contends that the jury recommendation against imposition of the death penalty under the Indiana death sentence statute should be treated in like manner, and that therefore the sentencing

judge in making a final determination of the sentence can have no power to override it and impose death. I agree. The recommendation of the jury against death should have the force of an acquittal of the death sentence, and a recommendation that the death penalty be imposed should have the same force as a verdict of guilty.

Pursuant to the statute the jury reconvenes in court for the sentencing hearing. It is presided over by the judge. The defendant is present with his counsel and the state by its trial prosecutor. Evidence is presented in an adversarial setting. The jury receives the instruction from the court regarding the issues presented which include the question of whether an aggravating circumstance exists and whether it is of such a character as not to be outweighed by mitigating circumstances. The burden is upon the state to prove the aggravating circumstance beyond a reasonable doubt. The lawyers make final arguments to the jury. The jury retires to deliberate and returns into open court with its verdict in the form of a recommendation. This is a full scale jury trial in every sense of those terms. The defendant must surely feel that he is in "direct peril" of receiving the death penalty as he stands to receive the recommendation of the jury. *Cf., Green v. United States*, (1957) 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199.

The majority opinion concludes that the *Bullington* rationale does not apply to the Indiana situation because (1) the recommendation of the jury is not final and binding upon the sentencing judge, as was the case in Missouri, and (2) the recommendation does not necessarily reflect the jury's determination that the State failed in its burden to prove an aggravating circumstance. I cannot agree that these two distinctions rob the Indiana death sentencing hearing before a jury of its trial character and force. It must be evident that the jury recommendation against imposition of death will have a great and profound persuasive force in determining what choice the judge will make at final determination time. The jury recommendation must be unanimous. *Judy v. State*, (1981) Ind., 416 N.E.2d 95. It is the personal judgment of twelve adult individuals of good will selected from a list comprised of a fair cross section of the community. The judge is also a member of that same community, sharing in its life and experience. The probability is very high that the judge, upon consideration of the recommendation will be brought to the brink of agreement with it in the very nature of things. The jury recommendation against death is so much like a binding decision, that constitutional protection against a second hearing before the judge on the propriety of death should be afforded. *Cf., Breed v. Jones*, (1975) 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346.

I also cannot agree with the analysis made by the majority of the underlying bases of the jury recommendation of no death in distinguishing this case from *Bullington*. According to the Indiana statute:

"(e) The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances." Ind.Code § 35-50-2-9.

According to this statute, a jury recommendation of no death would have one of two necessary characteristics. Logically, it would either be based upon the jury's determination that the State had failed to establish historical facts constituting an aggravating circumstance, or it would be based upon the jury's determination that the evidence presented had established historical facts constituting some mitigating circumstance. In either event, the judge's later procedure to decide whether the death penalty should be imposed, using "the same standards that the jury was required to consider" would result in a retrial upon the same questions of fact and any decision of the judge to override a jury recommendation of no death including as in the present case his express finding of no mitigating circumstances, would necessarily resolve

circumstance. In light of this acknowledged importance of the role of the jury, before a judge may impose a death sentence over a jury recommendation of no death sentence, that judge must articulate written findings, derived from clear and convincing evidence in the record, so that no reasonable person could differ with the determination. This standard, which has been utilized by the Supreme Court of Florida, *eg. Cannady v. State*, (1983) Fla., 427 So. 723, 732 (per curiam); *Tedder v. State*, (1975) Fla. 322 So.2d 908, 910 (per curiam), preserves the defendant's interests in having obtained a favorable jury recommendation after an adversary proceeding. *See Bullington v. Missouri*, (1981) 451 U.S. 430, 445–46, 101 S.Ct. 1852, 1861, 68 L.Ed.2d 270, 282. Any standard of less stringency detracts from the jury's contribution to the sentencing decision as recognized by the specific legislative directive that the judge consider the jury's recommendation. Given this command, and the statement of public policy that the death penalty is only discretionary even if all the requisite standards of proof are satisfied, in the case where the jury recommends mercy, the Legislature could not have intended that the judge merely disagree in order to override that recommendation. But for mere form, the trial judge may as well have discharged the jury upon receipt of the verdict upon the issue of guilt. It is clear that he either thought that the death sentence was required by law or that it was unalterably set in his mind. Hypothetically we could not accept a statement that proclaimed: "I find that the State has proven the existence of an aggravating circumstance authorizing a sentence of death, and I find no mitigating circumstances. I further find that the defendant, by erratic conduct during the trial, may have persuaded the jury to recommend mercy—or for reasons unknown, the jury may not be capable of rendering a rational recommendation upon the sentence determination. In any event, I have determined that a sentence of death is authorized by law, warranted by the circumstances and preferred by me. A recommendation of a life sentence by the jury would not alter my decision. I, therefore, dispense with the jury hearing upon the sentencing phase of this matter, and I now order a sentence of death." From a "due process" standpoint, the hypothetical is no more repugnant than the procedure and findings actually employed in this case.

I am also concerned that the trial judge has displayed an apparent misunderstanding of the term "mitigating circumstances," as used in the statute. I am drawn to this conclusion by his statements: "As for mitigating circumstances, the Court finds none.", and, " * * * and the Court finds no mitigating circumstances to outweigh it (the aggravating circumstance)." Whether or not there were mitigating circumstances of such weight as to create a conflict in the mind of a reasonable man upon a determination of the appropriate sentence is not a matter upon which I intend to imply an opinion. However, the record is replete with unrefuted evidence of circumstances which a reasonable man could not but weigh in the balance in making a decision of such gravity. In the main, I refer to the sordid evidence of the defendant's character, a paragon of revulsion which society simply cannot tolerate unfettered. This same evidence, however, also portrays a sick, rejected and tormented creature who, although legally accountable for his loathsome and despicable conduct is, himself, a victim of forces essentially beyond his control. Whether or not he should be permitted to live by reason of these circumstances, despite his vile crime, is a matter upon which reasonable minds may differ; but human decency, the statute (any other circumstances appropriate for consideration), and due process considerations require that they be weighed in the balance. The denial of the existence of any mitigating circumstances is indicative of the trial judge's misconception of his sentencing responsibility that is likely to have resulted in grievous error.

Additionally, the judge's unbridled discretion to reweigh the evidence under the same standards considered by the jury, which action I am not convinced occurred here, potentially injects the same type of arbitrariness into the system which the Supreme Court has condemned. In cases where the judge and jury disagree, Florida's heightened standard of proof has been implicitly approved as an integral and significant factor in sustaining the constitutionality of the sentencing scheme. *Barclay v. Florida*, (1983) ——— U.S. ———, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (plurality opinion); *Dobbert v. Florida*, (1977) 432 U.S. 282, 295–96, 97 S.Ct. 2290, 2299, 53 L.Ed.2d 344, 357–58; *Proffitt v. Florida*, (1976) 428 U.S. 242, 249, 96 S.Ct. 2960, 2965, 49 L.Ed.2d 913, 921. In light of Ind.Code § 35–50–2–9 and the above cited authorities, I am compelled to conclude that this Court's failure to impose a heightened standard of proof upon a judge who seeks to override a jury recommendation of mercy runs afoul of Federal constitutional proscriptions concerning the due process required prior to imposition of the death penalty.

III

Upon Issue No. V in the majority opinion, I believe that the appropriate standard for authentication has not been provided.

"Anyone who is familiar with a person's writing from experience, having seen him write, or having carried on correspondence with him or from the opportunities of having frequently handled and observed the person's handwriting, is competent as a non-expert to give an opinion as to the genuiness of his signature or handwriting." *Spencer v. State*, (1958) 237 Ind. 622, 626, 147 N.E.2d 581, 583. Dr. Abendroth testified that he had received three or four letters from Schiro, and he recalled some of their contents which he related to the court. He was also not equivocal about his ability to identify Defendant's handwriting nor to identify the exhibit at issue.

The majority appears to imply that, because Dr. Abendroth did not swear to knowledge of the origins of the first letters, he was not qualified to identify Defendant's handwriting. I do not understand the connection and note that in *Thomas v. State*, (1885) 103 Ind. 419, 427-29, 2 N.E. 808, 813-15, no such connection was required. Therein, though the witness produced ten letters, assertedly written by Defendant, before identifying the handwriting on the two letters, exhibits at issue, there was no testimony of how the witness knew that the accused had penned the first ten. Additionally, in this case, there is no showing that Mary Lee, whom the majority asserts could have provided the necessary authentication, did anything more than deliver the letter nor that she had any familiarity with Defendant's handwriting. Consequently, under the majority's ruling, in most cases, only the author of the letter would be able to authenticate it no matter how many times the witness, through whom a party sought to introduce the letter, had received letters from the author of the letter at issue. The law does not impose this onerous burden as the foundation for admitting a letter. *Thomas v. State, supra.*

However, the trial court has broad discretion in admitting or rejecting writings authenticated only by testimony of a witness who professes to recognize the author's handwriting. Thus, although I do not agree with the majority's conclusion that the letter was inadmissible, neither do I believe that the court committed error by rejecting it, as it was not required to accept Dr. Abendroth's testimony as a sufficiently reliable authentication.

I vote to affirm the trial court's judgment with respect to the conviction of Defendant but to vacate the death sentence and remand the case for a new sentencing hearing.

find no direct statement in the judge's records and statement of reasons quoted above for imposing the death penalty that he *personally* reached this level of certainty upon each of these elements comprising the aggravating circumstance. Quite obviously, until the point in time is reached that the judge conducts his own sentencing hearing to finally determine the sentence, he has not been called upon to make a factual determination beyond a reasonable doubt of the existence of the aggravating circumstance. The fact that the jury may have done so on some of the same elements in arriving at its verdict of guilty and in rejecting the plea of insanity as noted by the judge, cannot supplant the judge's obligation to do so. This finding of an aggravating circumstance by the sentencing judge is at the very core and heart of the final determination that death is to be imposed. The sentencing judge has not communicated to this Supreme Court Justice that he arrived at that finding at the required level of certainty. For this reason also, I cannot vote to permit his final determination to stand.

PRENTICE, J., concurs in part with concurring and dissenting opinion.

PRENTICE, Justice, concurring and dissenting.

I concur in the result reached by the majority with respect to its affirmance of the conviction of the defendant (appellant). I dissent, however, with respect to its affirmance of the sentence of death.

I.

I concur in part II of Justice DeBruler's dissenting opinion. The findings of the sentencing judge are devoid of any statement that he, himself, found, beyond a reasonable doubt from the evidence, that the defendant intentionally killed Laura Luebbehusen while committing or attempting to commit a rape upon her. I do not question that, under our standard for testing the sufficiency of the evidence upon appellate review, the evidence would have permitted such a finding, but it was not compelled. In the statement of his findings, the trial court judge correctly observed that one of the statutorily provided aggravating circumstances authorizing the imposition of a sentence of death is that the defendant committed murder by intentionally killing the victim. He proceeded to note, in particularity, that the jury had rejected Defendant's plea of insanity, and from this, he apparently concluded either that the jury had found, beyond a reasonable doubt, that the murder had been committed intentionally or that he was warranted in finding, beyond a reasonable doubt, from the jury's rejection of the insanity plea, that the murder had been committed intentionally. Neither would be correct.

Under the evidence, Defendant could have been found guilty of the crime charged whether he killed Laura Luebbehusen *intentionally* or knowingly or merely accidentally while committing or attempting to commit a rape. He was subject to the death penalty, however, only if he killed her *intentionally*. The interposition and rejection of the defense of insanity (mental disease or defect) Ind.Code § 35-41-3-6 (Burns 1979) simply has no relevance to the issue of whether or not the killing was done intentionally; yet, it is obvious that the trial court judge regarded it as significant, if not in fact controlling.

II

The trial court judge also misconstrued the statute, Ind.Code § 35–50–2–9 (Burns 1979), as a mandate to the judge to impose the death sentence in the event that an aggravating circumstance was found to exist, beyond a reasonable doubt, and that mitigating circumstances, if any, were outweighed by it. Clearly, the statute merely authorizes the imposition of the death sentence, under such circumstances.

Given the existence of one or more of the enumerated aggravating circumstances and the absence of any of the first six (6) mitigating circumstances enumerated under subsection (c) of the statute, the statute mandates neither a recommendation of death by the jury nor the imposition of the death penalty by the judge. Subsection (e) provides that the standards employed by the jury and those employed by the judge be the same, and the seventh (7th) enumerated mitigating circumstance is entirely subjective, i.e., "(7) Any other circumstances appropriate for consideration." It permits unbridled discretion to spare defendants from the supreme penalty.

The majority has said, "The language of the trial court may appear awkward but nowhere has the trial court * * * attempted to apply anything resembling a mandatory death penalty." I emphatically disagree with this statement. The statement of the trial judge, for the most part, was a recitation of the death sentence statute and certain evidence supportive of the sentence. There is nothing contained in the statement of the trial judge, however, that acknowledges that it is he who has determined that the defendant should die. There is nothing contained in the statement to indicate that he understood that it was his burden, under the law, to determine whether the defendant should live or die. Rather, the entire tenor of the findings that closed with the statements, " * * * the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.", reflects that the judge regarded himself as a mere conduit who had the unpleasant ministerial duty to announce a sentence fixed by statute.

The trial judge's comments amply demonstrate his misunderstanding of the standard he was required to apply in reaching the sentencing decision. Ind.Code § 35–50–2–9 affirmatively mandates the judge to employ the same standards that the jury was required to consider. That standard is stated as follows:

"The jury *may* recommend the death penalty only if it finds: * * *."

In *Hoskins v. State*, (1982) Ind., 441 N.E.2d 415, 430 (Prentice, J., joined by Hunter, J., concurring) I noted that this standard does not require the imposition of the death penalty under any circumstances whatsoever and that, "It is not altogether illogical to conclude, therefore, that although a juror finds facts warranting the death penalty and no mitigating circumstances whatsoever, he *may*, nevertheless, recommend against imposing it without violating his oath." Similarly, the trial judge may refrain from imposing a sentence of death even though its imposition could not be held to be unreasonable under the circumstances. Moreover, it appears from the context of the judge's comments that, had he believed he had a choice, which he in fact did have under the statute, he would not have sentenced Defendant to death. The record reveals that the death sentence was imposed upon an erroneous standard. Consequently, the matter should be remanded for a new sentencing hearing. *State v. Watson*, (1982) La., 423 So.2d 1130, 1134–36.

In addition to being convinced that the sentence was imposed upon an erroneous standard, I am also convinced that the provisions of Ind.Code § 35–50–2–9, read in conjunction with Federal Due Process requirements concerning capital punishment, require the judge to give considerable weight to the jury's recommendation of mercy and this Court to review a death sentence, imposed contrary to the recommendation of the jury, upon a standard higher than a mere search for *manifest unreasonableness* as currently required under Ind.R.App.Rev.Sen. 2.

The nunc pro tunc order of February 23, 1983 does not state how the jury's recommendation was considered nor how much weight it was given by the judge.

The United States Supreme Court considers the jury "a significant and reliable objective index of contemporary values" with respect to the imposition of the death penalty. *Gregg v. Georgia*, (1976) 428 U.S. 153, 181, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859, 879 (plurality opinion of Stewart, J.). *Accord Brewer v. State*, (1981) Ind., 417 N.E.2d 889, 909. Our Legislature echoed these sentiments when it mandated the trial court to consider the jury's recommendation, Ind.Code § 35–50–2–9(e), and by allowing the jury to consider "any other circumstances appropriate for consideration." Ind.Code § 35–50–2–9(c)(7), as a mitigating

biased as to make sentencing determination arbitrary or capricious.

10. Criminal Law ⇐1144.10

In addressing issue of competency of counsel, Supreme Court indulges strong presumption that counsel's conduct falls within wide range of reasonable professional assistance.

11. Criminal Law ⇐641.13(1)

Under "performance component" of test employed in addressing issue of competency of counsel, defendant must show that counsel's alleged acts or omissions fell outside of wide range of reasonable professional assistance; if defendant satisfies that step, he must then establish under "prejudice component" that counsel's errors had adverse effect upon judgment.

12. Criminal Law ⇐641.13(1)

In applying two-step test employed in addressing issue of competency of counsel, it is not necessary to address both components if defendant makes insufficient showing as to one.

13. Criminal Law ⇐641.13(2)

Instruction regarding encompassing applicability of guilty but mentally ill verdicts cured potentially prejudicial impact of omission of verdict forms for "guilty of murder while committing and attempting to commit rape but mentally ill" and "guilty of murder while committing and attempting to commit criminal deviate conduct but mentally ill," and thus, defendant was unable to establish that his trial counsel's failure to assure that jury received all necessary verdict forms had adverse effect on judgment. U.S.C.A. Const.Amend. 6.

Susan K. Carpenter, Public Defender, Frances Watson Hardy, Deputy Public Defender, Indianapolis, for appellant.

Linley E. Pearson, Atty. Gen., Joseph N. Stevenson, Deputy Atty. Gen., Indianapolis, for appellee.

GIVAN, Chief Justice.

Appellant was convicted by a jury of Murder While Committing or Attempting to Commit Rape. The trial court sentenced appellant to death. The conviction and death sentence were affirmed by this Court on direct appeal. *Schiro v. State* (1983), Ind., 451 N.E.2d 1047 (DeBruler, J., and Prentice, J., dissenting as to sentence), *cert. denied*, — U.S. —, 104 S.Ct. 510, 78 L.Ed.2d 699. Appellant's Petition for Post-Conviction Relief was denied. He now appeals.

The facts of this case were set out at length in the opinion on direct appeal. *Schiro, supra* at 1049–50. They will not be repeated here.

Appellant raises two issues in this appeal: whether the post-conviction court erred in finding the death penalty was proper in light of his allegations that the trial judge was biased and improperly considered appellant's behavior during the course of the trial in his sentencing determination; and whether the post-conviction court erred in finding appellant was not denied effective assistance of counsel.

[1, 2] In reviewing the denial of a post-conviction petition, this Court does not weigh evidence nor judge the credibility of witnesses. *Owens v. State* (1984), Ind., 464 N.E.2d 1277. The petitioner must satisfy this Court that the evidence as a whole leads unmistakably to a decision in his favor. *Bean v. State* (1984), Ind., 467 N.E.2d 671.

Appellant's first issue is divided into four subissues. In the first three subissues, which address the trial court's consideration of his behavior during the trial, appellant alleges: 1) that the information could not be relied upon because it was not introduced into evidence; 2) that because he did not testify, reliance on observations of his behavior violated his Fifth Amendment rights; and 3) that he was denied his right to effective assistance of counsel because defense counsel was not afforded an opportunity to comment on facts influencing the sentencing decision. The fourth subissue concerns a comment made by the trial judge which appellant argues demonstrates the judge was biased and therefore unable to objectively render the sentencing determination.

Upon review of appellant's direct appeal, this Court found the trial court's original findings pertaining to the sentencing did not set out clearly and properly the court's reasons for imposing the death penalty. *Schiro, supra* at 1056. We ordered the court to make written findings setting out the aggravating circumstance proved beyond a reasonable doubt and the mitigating circumstances, if any, as specified in Ind. Code § 35-50-2-9. *Id.* In its *nunc pro tunc* entry the court found that the aggravating circumstance set out in Ind.Code § 35-50-2-9(b)(1) was proved beyond a reasonable doubt.

The court then stated that it found no mitigating circumstances, and addressed each of the possible mitigating circumstances delineated in Ind.Code § 35-50-2-9. In reference to the statutory mitigating circumstances concerning a defendant's mental or emotional condition, subsection (6)(2), and impairment of a defendant's capacity to appreciate the criminality of his conduct, subsection (c)(6), the court made the following finding:

"This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

Appellant contends this finding constitutes the court's primary basis for sentencing him to death after the jury had recommended the death penalty not be imposed. He argues that "obviously" the court based its death penalty judgment on its observations, representing an "absolute denial of due process."

[3] We cannot agree with appellant's conclusory assertion that the court based its judgment on observations of his behavior. The court, as prescribed by the death penalty statute, found the existence of an aggravating circumstance proved beyond a reasonable doubt. *Schiro, supra* at 1058. It addressed each of the possible mitigating circumstances delineated in the statute. Regarding appellant's mental state, the court made additional findings which cited testimony by psychiatric experts and evidence of appellant's attempt to conceal his crime. *Id.* at 1059. While the court's observations were certainly germane to its consideration of the jury's recommendation, it cannot be said its finding that appellant may have misled the jury constituted the basis for imposition of the death penalty.

[4, 5] Neither can we agree with appellant's contention that consideration of his behavior was impermissible because it was information not admitted into evidence. It is axiomatic that a trial court, within its discretion, can consider a defendant's behavior in the courtroom, regardless of whether the jury is present. The court can properly consider such "non-evidentiary" information as the pre-sentence investigation report and its perception of a defendant's remorse or lack thereof. We find no authority to support the conclusion appellant would have us draw, that a judge in a capital case is precluded from considering a defendant's behavior during the course of the trial if evidence of such behavior is not admitted into evidence.

Appellant nevertheless argues that under *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393, the death penalty is invalid. In that case a Florida jury recommended a life sentence. The trial judge, as in the instant case, overrode the jury's recommendation and sentenced the defendant to death. In imposing the death penalty the judge stated that his decision was based in part on a presentence report which contained a confidential portion not available to the defense.

counsel was inadequate because he did not submit such an instruction.

In deciding whether to give a lesser included offense instruction, the trial court applies the following test:

"In determining whether to instruct the jury that they may return verdicts on lesser-included offenses, the trial court must apply a two-part test. First, by examining the statutes defining greater and lesser-included offenses, and the charging instrument, the court determines whether the lesser-included offenses to be instructed are inherently included in the greater charge, or 'factually' included in the charging instrument's allegations of the means by which the greater crime allegedly was committed. Second, the court must make a determination of whether, assuming that an offense was committed, the evidence would, *prima facie*, warrant a conviction for a lesser-included offense, or could only warrant a conviction for the principal charge, in which case the lesser-included offense instructions should not be given." (citations omitted.)

Henning v. State (1985), Ind., 477 N.E.2d 547, 550–551. In this case the evidence conclusively demonstrated that Officer Bauner obtained phencyclidine from someone. The issue at trial was whether or not he obtained phencyclidine from the Defendant. Thus, there is no question that a transaction involving phencyclidine did occur. An instruction that the jury could convict Defendant of the lesser offense of "possession," thus, would not have been warranted under the evidence, would have invited a compromise verdict, and would properly have been refused. Defendant has demonstrated no error by counsel in failing to submit such instructions.

[9, 10] Finally, Defendant presents a general attack upon trial counsel's performance, arguing in particular that he should have called character witnesses or presented other evidence on Defendant's behalf. However, before a claim of ineffective assistance of counsel can be premised upon his failure to present evidence, it must be shown that such evidence existed and was reasonably available. Defendant's claim of ineffective assistance of counsel is not borne out by the inaction cited.

We find no error, hence the judgment of the trial court is affirmed.

GIVAN, C.J., and DeBRULER and PIVARNIK, JJ., concur.

HUNTER, J., not participating.

Thomas N. SCHIRO, Appellant,

v.

STATE of Indiana, Appellee.

No. 1084S423.

Supreme Court of Indiana.

June 28, 1985.

Rehearing Denied Sept. 4, 1985.

Defendant, petitioned for postconviction relief. The Circuit Court, Brown County, James M. Dixon, J., denied the petition. Defendant appealed. The Supreme Court, Givan, C.J., held that: (1) trial judge's finding that defendant might have misled jury by his continual rocking motions during trial did not constitute basis for imposition of death penalty, (2) defendant had opportunity to challenge trial judge's observations regarding his conduct so that defendant's due process rights were not violated, (3) the trial judge's observations regarding defendant's conduct were not directed toward defendant's exercise of his constitutional rights, (4) defendant was not denied his Sixth Amendment right to effective representation under theory that sentence was based on information which he had no opportunity to deny or explain, (5) judge's remark regarding whether defendant was going to live or die was insufficient evidence from which to conclude that judge was so biased as to make sentencing determination arbitrary or capricious, and (6) instruction regarding encompassing applicability of guilty but mentally ill verdicts cured potentially prejudicial impact of omission of verdict forms.

Affirmed.

DeBruler, J., dissented and filed an opinion.

1. Criminal Law ⇐1158(1)

In reviewing denial of postconviction petition, Supreme Court does not weigh evidence or judge credibility of witnesses.

2. Criminal Law ⇐1158(1)

On review of denial of postconviction petition, petitioner must satisfy Supreme Court that evidence as whole leads unmistakably to decision in his favor.

3. Criminal Law ⇐1208.1(4)

Although trial judge's observations of defendant's behavior during course of trial were germane to his consideration of jury's recommendation that death penalty not be imposed, trial judge's finding that defendant might have misled jury by his continual rocking motions during trial when jury was present, but which did not occur when defendant was out of jury's presence, did not constitute basis for imposition of death penalty.

4. Criminal Law ⇐1208.1(4)

Trial court, within its discretion, can consider defendant's behavior in courtroom regardless of whether jury is present and thus judge in capital case is not precluded from considering defendant's behavior during course of trial even if evidence of such behavior is not admitted into evidence.

5. Criminal Law ⇐986.2(6), 986.4(1)

Trial court can properly consider such "non-evidentiary" information as presentence investigation report and its perception of defendant's remorse or lack thereof.

6. Constitutional Law ⇐270(2)

Defendant's due process rights were not violated under theory that death sentence was imposed on basis of information which defendant had no opportunity to deny or explain where, at sentencing hearing, judge expressly stated his observations of defendant's behavior and its relevance to sentencing determination, and thus defendant had opportunity to challenge observations and judge's conclusions based thereon, and where testimony was introduced to trial by both sides in reference to defendant's prior rocking behavior so that defense counsel could have presented additional evidence at sentencing hearing pertaining to statutory mitigating circumstances. IC 35-50-2-9(d)(1982 Ed.); U.S.C.A. Const. Amends. 5, 14.

7. Criminal Law ⇐393(1)

Trial judge's observations about defendant's rocking motions during trial were directed toward possible mitigating factors and jury's recommendation that death penalty not be imposed, not to defendant's exercising of his constitutional rights, and thus, trial court's consideration of defendant's behavior did not violate his right against self-incrimination. IC 35-50-2-9(d) (1982 Ed.); Const. Art. 1, § 14; U.S.C.A. Const.Amend. 5.

8. Criminal Law ⇐641.13(7)

Defendant was not denied his Sixth Amendment right to effective representation under theory that sentence was based on information which he had no opportunity to deny or explain where, at sentencing hearing, trial judge specifically stated his observations of defendant's behavior and jury's presence and relevance of those observations to sentencing determination so that counsel had opportunity to contemporaneously object to or rebut judge's observations. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐655(1)

Judge's remark regarding whether defendant was going to live or die, made in emotionally charged atmosphere preceding return of verdict, was insufficient evidence from which to conclude that judge was so

[12, 13] In applying the aforementioned two-step test, it is not necessary to address both components if the defendant makes an insufficient showing as to one. *Richardson, supra* at 501 (citation omitted). Because the instruction regarding the encompassing applicability of the guilty but mentally ill verdicts cured the potentially prejudicial impact of the omission of the verdict forms, appellant is unable to establish that counsel's omission had an adverse effect upon the judgment. The post-conviction court did not err in finding that appellant was not denied effective assistance of counsel.

The trial court is in all things affirmed.

PRENTICE and PIVARNIK, JJ., concur.

DeBRULER, J., dissents with separate opinion.

HUNTER, J., not participating.

DeBRULER, Justice, dissenting.

Petitioner-appellant was convicted of murder and sentenced to death. When the trial judge imposed the death sentence on October 2, 1981, he stated that he was relying in part on his personal observations of appellant's conduct in the Court's outer chambers, during the trial on the question of guilt or innocence, when the jury was not present. The trial judge had not previously disclosed to counsel for the parties that he had made those observations and that he would rely upon them in making the life or death decision. Thus, the decision itself was arrived at before counsel knew of this unique basis and had all opportunity to respond to it. This procedure does not satisfy the constitutional requirement of the due process of law.

In the aforementioned statement the judge said:

"This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

This is the justification of the judge's rejection of the jury's recommendation of life. By this revelation, the judge discloses that he deemed himself by reason of his observations, to be in a better position than the jury to make the life-death decision. I believe this was error.

In *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 the sentencing judge indicated that he selected death in part because of information contained in a presentence report, which information had not been disclosed to the defendant or his counsel and to which the defendant had no opportunity to respond. The U.S. Supreme Court set the sentence aside. Here, the opportunity to respond to Judge Rosen's statement did not arise until after he had made and formally announced his decision to override the jury recommendation of life and impose death.

The standards of due process are flexible and dictated by the circumstances and competing interests involved. A hearing must be "appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.*, (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. It is fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo* (1965), 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62. The interests of the defendant and the state in an accurate ascertainment of facts upon which a sentence of death may be given, are at the highest level. We are bound to adopt and adhere to procedures which insure against the arbitrary deprivation of life.

In these circumstances, the opportunity to respond to the factual information supplied by the judge's private observations, came after that factual information was used and the life or death decision was reached. This opportunity was not meaningful in time. The opportunity to respond was restricted to a request to reconsider a decision which had already been reached and publicly announced. Much judicial time and energy had already been invested in arriving at that decision. One need only compare the process of reaching a decision with the process of retreating from a decision, to appreciate the reality of the restriction resulting from the procedure employed here. In sum, to permit the personal observations of the judge, this new matter, to be swept in at the last moment, without prior notice, and to be used as a critical part of the basis for the sentencing court's decision, is contrary to my sense of fairness.

Jerry Lee STOUT, Appellant (Defendant Below),

v.

STATE of Indiana, Appellee (Plaintiff Below).

No. 782 S 259.

Supreme Court of Indiana.

July 1, 1985.

Defendant was convicted in the Circuit Court, Jennings County, Larry J. Greathouse, J., of burglary and theft, and he appealed. The Supreme Court, Prentice, J., held that: (1) error in giving instruction on flight as evidence of guilt was harmless; (2) photographs of recovered stolen items were admissible; (3) testimony of accomplice as to defendant's participation in prior crimes was admissible; (4) police officer could testify regarding statements of third parties which caused him to take certain action; (5) theft of items from victim's home and of automobile from victim's garage constituted only single theft offense; and (6) consecutive sentences were warranted.

Affirmed in part, vacated in part, and remanded.

Pivarnik, J., concurred in part and dissented in part.

1. Criminal Law ⇐814(12), 1172.6

Trial court should not have given jury instruction on flight as evidence of guilt, in light of uncontradicted evidence showing that defendant surrendered to police and did not attempt to flee; error was harmless, however, in light of direct testimony of accomplice and ample physical evidence linking defendant to crime.

2. Searches and Seizures ⇐7(26)

Whether nonowner may challenge constitutional validity of search depends on whether he has legitimate expectation of privacy in place searched, which is fact question to be determined on case-by-case basis. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⇐7(26)

Frequent guest at premises he does not own has no legitimate expectation of privacy in premises, so as to give him standing to challenge constitutionality of search, unless he produces other evidence to show that he maintains degree of control over premises. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐7(26)

Evidence that defendant stayed at residence of his girlfriend "once in a while" was insufficient to establish his legitimate expectation of privacy in residence sufficient to give him standing to challenge constitutionality of its search; defendant made no showing that he had any degree of control over residence or any part therein. U.S.C.A. Const.Amend. 4.

5. Criminal Law ⇐444

Victim's identification of photographs as pictures of items similar to those taken from his home was sufficient to establish relevancy and materiality of photographs in burglary prosecution; fact that victim

Id. at 353, 97 S.Ct. at 1202, 51 L.Ed.2d at 398-99.

The United States Supreme Court vacated the death sentence. The Court concluded the petitioner was denied due process because the death sentence was imposed, at least in part, on the basis of information which the petitioner had no opportunity to deny or explain. *Id.* at 362, 97 S.Ct. at 1207, 51 L.Ed.2d at 404. The Court found that because the confidential portion of the report was not part of the record on appeal, the Florida Supreme Court was unable to consider "the total record" in its review. *Id.* at 361, 97 S.Ct. at 1206, 51 L.Ed.2d at 404.

[6] The instant case is distinguishable. At the sentencing hearing the judge expressly stated his observations of appellant's behavior and its relevance to the sentencing determination. Appellant thus had an opportunity to challenge the observations, and the judge's conclusion based thereon, either contemporaneously or upon filing his motion to correct error. Further, this Court explicitly considered the controverted finding on review of appellant's direct appeal. *Schiro, supra* at 1057, 1059.

We also note that testimony was introduced at trial by both sides in reference to appellant's prior rocking behavior. Appellant introduced testimony that he rocked in the presence of witnesses. Despite appellant's contention of lack of notice of the court's conclusion based on such behavior, defense counsel, who was certainly aware of the continual rocking motions referred to by the court, could have presented additional evidence at the sentencing hearing pertaining to the statutory mitigating circumstances. *See* Ind.Code § 35-50-2-9(d). The due process violation found in *Gardner, supra* is not present here.

Appellant contends that because under the Fifth Amendment of the United States Constitution and Art. 1, § 14 of the Indiana Constitution the general trial demeanor and manner of a defendant who does not take the stand cannot be considered against him and no inference can be drawn from his failure to testify, the trial court's consideration of his behavior violates his right against self-incrimination.

[7] This argument is without merit. The sole case cited by appellant, *People v. Ramirez* (1983), 98 Ill.2d 439, 75 Ill.Dec. 241, 457 N.E.2d 31, is inapposite to the circumstances of the instant case. In *Ramirez* the State's attorney commented to the sentencing jury that the defendant had "sat silent" and offered no explanation for the crime. The Supreme Court of Illinois' decision to vacate the death sentence was based on the prosecutor's comment and the trial judge's refusal to properly instruct the jury not to consider the defendant's decision not to testify at the sentencing hearing. *Id.* at 472-73, 457 N.E.2d at 47.

Although the impermissible comment in *Ramirez* was couched in terms of the defendant's "conduct", the crux of the constitutional violation was the impropriety of commenting on the defendant's decision not to testify. Here, the trial judge's observations were directed to two of the possible mitigating factors and to the jury's recommendation, not to appellant's exercising of his constitutional rights. The record does not reveal any comment by the prosecution or by the court made in reference to appellant's decision not to testify at the sentencing hearing.

In an argument related to his contention that the trial court erred in considering non-evidentiary information, appellant asserts he was denied his Sixth Amendment right to effective representation upon the sentence being based on information which he had no opportunity to deny or explain.

[8] This argument is also without merit. At the sentencing hearing the trial judge specifically stated his observations and their relevance to the sentencing determination. Counsel thus had the opportunity to contemporaneously object to or rebut the judge's observations. As the finding was stated explicitly and openly, we cannot conclude that the court's reference to its observations of appellant's demeanor precluded defense counsel from commenting on facts influencing the sentencing decision. *See Gardner, supra*, 430 U.S. at 360, 97 S.Ct. at 1206, 51 L.Ed.2d at 403.

In his fourth subissue appellant alleges the trial judge was biased. This allegation is premised on a comment made by the judge to a newspaper reporter which appellant argues supports the conclusion the judge had predetermined that the death penalty would be imposed.

The newspaper reporter, Jocelyn Winnecke of the *Evansville Sunday Courier and Press*, testified at the post-conviction hearing that the judge, The Honorable Samuel R. Rosen, remarked to her after the guilty verdict was returned that "we're going to fry the boy." Judge Rosen testified that before entering the courtroom to receive the guilty verdict he said "soon we'll know whether he'll live or die." Judge Rosen also testified that he would never use the word "fry" in that context and that he did not make up his mind until the date of sentencing whether the death penalty would be imposed. Vanderburgh County Deputy Prosecutor Jerry Atkinson, who prosecuted the case, was privy to the conversation between Winnecke and Judge Rosen. His recollection at the hearing was that Judge Rosen stated "I think the boy is going to die."

[9] Appellant argues that the judge's statement, coupled with the judge's reliance on his personal observations, conclusively reflects bias and a predetermination of the death sentence. As stated *infra*, the observations were properly relied upon by the judge and in no way represent a loss of objectivity. The comment made by Judge Rosen, in the emotionally charged atmosphere preceding the return of the verdict, is insufficient evidence from which to conclude the judge was so biased as to make the sentencing determination arbitrary or capricious. The post-conviction court did not err in finding it was not improper for the trial judge to consider appellant's behavior and that the death sentence did not result from a loss of objectivity on the part of the judge.

Appellant also alleges he was denied his Sixth Amendment right to effective assistance of counsel because his trial counsel failed to assure that the jury received all the necessary verdict forms.

[10, 11] In addressing the issue of competency of counsel, this Court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Bailey v. State* (1985), Ind., 472 N.E.2d 1260; *Elliott v. State* (1984), Ind., 465 N.E.2d 707. We apply a two-step test comprised of a "performance component" and a "prejudice component". Under the first step, a defendant must show counsel's alleged acts or omissions fell outside the wide range of reasonable professional assistance. If the defendant satisfies the first step of the test, he must then establish that counsel's errors had an adverse effect upon the judgment. *Richardson v. State* (1985), Ind., 476 N.E.2d 497; *Lawrence v. State* (1984), Ind., 464 N.E.2d 1291.

Trial counsel did not submit verdict forms for the offenses of guilty of murder while committing and attempting to commit rape but mentally ill and guilty of murder while committing and attempting to commit criminal deviate conduct but mentally ill. *Schiro, supra* at 1062. Appellant contends that because the jury returned a felony murder guilty verdict on a count for which they were not supplied with a guilty but mentally ill verdict form confidence in the outcome of his trial was undermined.

This issue was raised in appellant's direct appeal in the context of trial court error in failing to supply the jury with all the necessary verdict forms. *Id.* We determined that appellant's Instruction No. 2, which informed the jury that the possible verdict of guilty but mentally ill was submitted to them on all counts of the information, sufficiently informed the jury that the mentally ill verdict "applied to Guilty of Murder/Rape and Guilty of Murder/Deviate Conduct, as well as Guilty of Murder." *Id.* at 1063. As appellant failed to show any prejudice, there was no reversible error on that issue. *Id.*

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was so prejudicial as to have deprived him of fair trial. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐998(8)

For purpose of rule that postconviction relief petitioner alleging ineffectiveness of counsel must prove that substandard performance was so prejudicial as to have deprived him of fair trial, fair trial is denied when conviction or sentence resulted from breakdown in adversarial process which rendered result unreliable. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐998(3)

Item is waived for postconviction review, where item was available to defendant on direct appeal but not pursued.

4. Judgment ⇐751

Issue previously raised and determined adverse to postconviction relief petitioner's position is res judicata.

5. Judgment ⇐751

Postconviction relief petitioner's allegations that statute failed to provide guidelines for consideration of jury's recommendation and for appellate review of sentences, and that error was committed in admitting search warrant, affidavit, and physical items, in excluding handwritten document, and in providing verdict forms, were res judicata due to defendant's direct appeal of conviction.

6. Criminal Law ⇐998(16)

Postconviction relief petitioner alleging ineffectiveness of counsel must overcome heavy strong and convincing evidence a presumption that counsel has prepared and executed his client's defense effectively. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.13(1)

Isolated bad tactics or inexperience do not necessarily amount to ineffective assistance of counsel. U.S.C.A. Const. Amend. 6.

8. Criminal Law ⇐641.13(6)

Failure of defense counsel to pursue leads, assuming arguendo that prisoner did bring those matters to counsel's attention, did not constitute ineffective assistance of counsel, prisoner claimed that there was evidence that victim consented to sexual encounters and that evidence could have been proven by checking with bartenders and clerks at bars, but prisoner never gave names of establishments he and victim allegedly visited or identified anyone in those establishments who could verify story, and allegedly coerced testimony of prisoner's girl friend as to alleged admissions to her by prisoner recounted nothing which prisoner did not tell others in his confession. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐641.13(2)

Failure of defense counsel to request sequestration of jury did not constitute ineffective assistance of counsel; news reports on trial presented by prisoner were all subsequent to jury's final recommendation and judge's final sentence, and prisoner did not present any evidence that any juror ignored judge's instructions or became exposed to any outside influence from individuals or media sources. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.13(7)

Prisoner did not receive ineffective assistance of counsel on basis that counsel did not present adequate mitigation evidence after conviction; significant mitigating evidence was presented in guilt phase in which insanity defense was raised, thereby bringing into issue matters of character, background, and history that are normally reserved for penalty phase, and mitigating evidence was argued by counsel in penalty phase. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐998(21)

Prisoner waived issue of ineffective appellate representation in second post conviction petition by raising issue in original postconviction petition. U.S.C.A. Const. Amend. 6.

12. Criminal Law ⇐1077.3

Appellate counsel need not raise issue on appeal that in his professional judgment appears frivolous or unavailing.

13. Criminal Law ⇐641.13(6)

Defense counsel's alleged failure to effectively cross-examine State's rebuttal witness who detailed armed sexual assault which prisoner perpetrated against her, and failure to object to array of photos from which she picked prisoner as her assailant, did not constitute ineffective assistance of counsel; there was no showing as to what information might have been gained by further cross-examination of witness, and witness' testimony did no more than repeat one instance of as many as 23 instances of other unrelated sexual assaults prisoner committed which he himself related in statement. U.S.C.A. Const. Amend. 6.

14. Criminal Law ⇐641.13(2)

Defense counsel's failure to respond to prisoner's family's assertion that psychiatric witness tried to "shake him down" for extra fee as condition for most favorable testimony did not constitute ineffective assistance of counsel; assertion rested on multiple hearsay attributed by prisoner to his parents, facts of alleged "shakedown" were not shown in evidence, and prisoner's parents never testified or told anyone else that incident occurred. U.S.C.A. Const. Amend. 6.

15. Criminal Law ⇐199

For purpose of double jeopardy rule that conviction of lesser-included offense is acquittal for greater offense, aggravating circumstance is not "offense." U.S.C.A. Const.Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

16. Homicide ⇐235

One can be found guilty of felony-murder, where intention was to commit underlying felony, without necessarily intending to commit murder. IC 35-42-1-1(2) (1988 Ed.).

17. Homicide ⇐357(3)

One convicted of felony-murder may also be shown to have intentionally killed victim while perpetrating felony as aggravating circumstances. IC 35-42-1-1(2) (1988 Ed.).

18. Indictment and Information ⇐109(8)

Crimes of murder and felony-murder each contain elements different from the other, but are equal in rank, and one is not included offense of other. IC 35-42-1-1(1, 2) (1988 Ed.).

19. Homicide ⇐315

Jury verdict finding defendant charged with both murder and felony-murder guilty of only felony murder, does not operate as acquittal of elements of murder jury chose not to consider. IC 35-42-1-1(1, 2) (1988 Ed.).

20. Homicide ⇐315, 357(3)

Jury verdict finding defendant guilty of felony-murder, but which remained silent on charge of murder by knowingly killing, did not preclude trial court from considering aggravating circumstance of intentional killing victim while committing or attempting to commit rape and criminal deviate conduct for purpose of imposing death penalty; finding of guilty on felony-murder charge was not conclusive finding of lack of intent to murder. IC 35-42-1-1(1, 2) (1988 Ed.).

Alex R. Voils, Jr., Indianapolis, for appellant.

Linley E. Pearson, Atty. Gen., Joseph N. Stevenson, Deputy Atty. Gen., Indianapolis, for appellee.

PIVARNIK, Justice.

This direct appeal arises from a denial of post-conviction relief. The history of this cause in this court is extensive. On September 12, 1981, Defendant Schiro was found guilty of the offense of murder while committing, and attempting to commit, the crime of rape. The trial court entered judgment of conviction on the jury's verdict. The jury recommended that the death penalty not be imposed but the trial court overruled that recommendation and ordered the death sentence for Schiro. This court affirmed the trial court's judgment. *Schiro v. State* (1983), Ind., 451 N.E.2d 1047. On November 28, 1983, the United States Supreme Court denied Schiro's writ of certiorari to vacate the death penalty. *Schiro v. Indiana* (1983), 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699. On May 11, 1984, Schiro filed an amended petition for

Edwin Paul BAUM, Appellant,

v.

STATE of Indiana, Appellee.

No. 29S00-8801-PC-57.

Supreme Court of Indiana.

Feb. 7, 1989.

Petitioner filed second postconviction relief petition alleging ineffective assistance of counsel at trial and at first postconviction relief proceeding. The Hamilton Superior Court No. 1, Donald E. Foulke, J., denied petition, and petitioner appealed. The Supreme Court, Givan, J., held that: (1) petition presenting a collateral attack upon prior court judgment denying petition for postconviction relief alleging defective performance of counsel at prior postconviction hearing posed no cognizable grounds for postconviction relief, and (2) right to counsel in postconviction proceedings is guaranteed by neither the United States nor State Constitution.

Affirmed.

1. Criminal Law ⇐998(21)

Petition collaterally attacking prior court judgment denying petition for postconviction relief alleging defective performance of counsel at prior postconviction hearing posed no cognizable grounds for postconviction relief, and therefore was subject to denial without a hearing. Post Conviction Rule 1, §§ 1, 4(e).

2. Criminal Law ⇐998(21)

If convicted person wishes to challenge performance of his defense counsel at trial upon criminal charges, he may do so, and if such challenge is included in second petition for postconviction relief, claim is properly subject to waiver or res judicata.

3. Criminal Law ⇐998(20)

Right to counsel in postconviction proceedings is guaranteed by neither the United States nor State Constitution. U.S.C.A. Const.Amend. 6; Const. Art. 1, § 13.

4. Criminal Law ⇐998(20)

If counsel, on petition for postconviction relief, in fact appeared and represented petitioner in a procedurally fair setting which resulted in a judgment of the court, it is not necessary to judge his performance by the rigorous standards set forth in *Strickland v. Washington*. U.S.C.A. Const.Amend. 6.

Gerald M. DeWeese, Noblesville, for appellant.

Linley E. Pearson, Atty. Gen., Michael Gene Worden, Deputy Atty. Gen., Indianapolis, for appellee.

GIVAN, Judge.

This is an appeal from the denial of appellant's second post-conviction relief petition. In 1975, appellant was tried before a jury on a charge of First Degree Murder. He was found guilty of Second Degree Murder and sentenced to life imprisonment. We affirmed his conviction on direct appeal *Baum v. State* (1976), 264 Ind. 421, 345 N.E.2d 831. Later in 1976, appellant filed his first petition for post-conviction relief, which was denied after a hearing in 1977. We affirmed that denial in *Baum v. State* (1978), 269 Ind. 176, 379 N.E.2d 437. Appellant filed his second post-conviction relief petition in 1986, alleging ineffective assistance of counsel at his trial and at his first post-conviction relief proceeding. After a hearing in 1987, the trial court denied the petition, resulting in the instant appeal.

Appellant contends the trial court erred in denying his second petition for post-conviction relief by finding he was not denied effective assistance of counsel for his first petition.

[1, 2] Under Ind.R.P.C.R. 1, § 1, a petitioner is authorized to challenge his conviction and sentence. Appellant's petition does not do this. Instead he presents a collateral attack upon a prior court judgment denying post-conviction relief. His collateral attack alleges defective performance of counsel at a prior post-conviction hearing. The petition poses no cognizable grounds for post-conviction relief, and is

therefore was subject to being denied without a hearing per Ind.R.P.C.R. 1, § 4(e). If a convicted person wishes to challenge the performance of his defense counsel at a trial upon criminal charges, he may do so. If such challenge is included in the second petition for post-conviction relief, the claim then is properly subject to waiver or *res judicata*. *Tillman v. State* (1987), Ind., 511 N.E.2d 447.

Appellant's attempt in this instance should not receive sanction because it results in an avoidance of legitimate defenses and thus constitutes an abuse of the post-conviction remedy. Any determination of merit of appellant's claim would require creation of legal standards to be applied when judging the performance of counsel in prosecuting a petition under Ind.R.P.C.R. 1. All of appellant's assertions in his petition, which resulted in the judgment challenged in this appeal, are made to demonstrate that his counsel's performance in prosecuting his first petition for post-conviction relief was defective.

[3] The right to counsel in post-conviction proceedings is guaranteed by neither the Sixth Amendment of the United States Constitution nor art. 1, § 13 of the Constitution of Indiana. A petition for post-conviction relief is not generally regarded as a criminal proceeding and does not call for a public trial within the meaning of these constitutional provisions. *Carman v. State* (1935), 208 Ind. 297, 196 N.E. 78. It thus is not required that the constitutional standards be employed when judging the performance of counsel when prosecuting a post-conviction petition at the trial level or at the appellate level.

[4] We therefore apply a lesser standard responsive more to the due course of law or due process of law principles which are at the heart of the civil post-conviction remedy. We adopt the standard that if counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court, it is not necessary to judge his performance by the rigorous standard set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

The post-conviction court is affirmed.

SHEPARD, C.J., and DeBRULER, PIVARNIK and DICKSON, JJ., concur.

Thomas N. SCHIRO, Appellant (Defendant below),

v.

STATE of Indiana, Appellee (Plaintiff below).

No. 07S00-8807-PC-656.

Supreme Court of Indiana.

Feb. 8, 1989.

Prisoner previously convicted of murder while committing and attempting to commit crime of rape filed second postconviction relief petition. The Brown County Circuit Court, John Baker, Special Judge, denied petition, and prisoner appealed. The Supreme Court, Pivarnik, J., held that: (1) issues raised regarding error at trial were res judicata due to prisoner's direct appeal of conviction; (2) prisoner did not receive ineffective assistance of counsel; and (3) aggravating circumstance of intentional killing could be considered at penalty phase of trial.

Affirmed.

DeBruler, J., filed dissenting opinion in which Dickson, J., concurred.

1. Criminal Law ⇐998(8)

To prevail on claim of ineffectiveness of counsel, postconviction relief petitioner must prove counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that such substandard performance

show he was denied a fair trial when the conviction or sentence resulted from a breakdown in the adversarial process which rendered the result unreliable. *Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L.Ed.2d at 699; *Lawrence*, 464 N.E.2d at 1294. To meet this burden, a petitioner must overcome by strong and convincing evidence a presumption that counsel has prepared and executed his client's defense effectively. *Williams v. State* (1987), Ind., 508 N.E.2d 1264, 1266–67. The question is factually oriented. This court does not speculate about what may have been the most advantageous strategy. Isolated bad tactics or inexperience do not necessarily amount to ineffective assistance of counsel. *McChristian v. State* (1987), Ind., 511 N.E.2d 297, 300.

(A)

[8] In the second PC hearing, Schiro claims he told his counsel facts which should have been used in his defense but were not. He claimed there was evidence the victim consented to the sexual encounters and this could have been proven by checking with bartenders and clerks at bars. He further claimed Mary Lee, his girlfriend, told him she was coerced into her testimony which included his admission to, and description of, the crimes committed upon her. However, Schiro never gave the names of the establishments he and the victim allegedly visited, or identified anyone in any of those establishments who could verify his story. Further, Mary Lee appeared as a witness attempting to help him. She recounted nothing of what Schiro told her which he had not himself told other psychiatric expert witnesses in a thirty-page confession that was referred to as an "autobiography."

Schiro claimed insanity as his defense at trial. The claims he presently makes regarding the probative value of the evidence he allegedly gave his lawyer, are totally inconsistent with the insanity defense and all other evidence in the case. Psychiatric testimony at trial showed that Schiro was a manipulative and incredible individual; the trial court was therefore justified in treating his assertions as questionable and unsubstantiated. There was ample evidence justifying the trial court's deciding the credibility issue, and we find no reason to disturb it. Furthermore, even if we assume *arguendo* that Schiro did bring these matters to his counsel's attention, it was a rational strategy decision to not develop two unpromising and essentially useless leads which could be more damaging than helpful to Schiro.

(B)

[9] Schiro also claims ineffective assistance in counsel's failure to sequester the jury. Counsel was under no duty to request sequestration in a capital case and petitioner must show prejudice by failure to move for it. *Burris v. State* (1984), Ind., 465 N.E.2d 171, 193, *cert. denied*, 469 U.S. 1132, 105 S.Ct. 816, 83 L.Ed.2d 809. To support his contention, Schiro presented a few newspaper clippings showing regional newspapers reported the trial. Included were articles about the jury's final recommendation and the judge's final sentence. Though these reports obviously did not affect the jury during its deliberations. He located seven jurors but did not present any evidence that any juror ignored the judge's instructions or became exposed to any outside influence from individuals or media sources. Because he failed in his burden of proof to show prejudice, we must find the trial court correctly rejected the contention of ineffective representation of counsel.

(C)

[10] Schiro claims counsel did not present an adequate mitigation defense after the penalty phase conviction. The PCR court found Schiro failed to prove counsel's decision was unreasonable or prejudicial. The court's findings of fact noted significant mitigating evidence was presented at the guilt phase of the trial and was argued by counsel in the penalty phase. Schiro raised the insanity defense, thereby bringing into issue at the guilt phase all those matters of character, background, and history that normally are reserved for the

penalty phase. It is a defensible strategic decision to use all this evidence at the guilt phase to try to obtain an acquittal and not reintroduce all the same evidence at the penalty phase. The trial court was justified in finding counsel's performance in this area did not depart from reasonable norms of representation, and therefore no prejudice was shown.

(D)

[11, 12] Schiro also identifies seven issues he claims were preserved for appeal but not presented by appellate counsel. This issue of ineffective appellate representation was available for presentation in the original post-conviction petition and therefore is waived in this petition. *Lane*, 521 N.E.2d at 949. Furthermore, appellate counsel need not raise on appeal an issue that in his professional judgment appears frivolous or unavailing. *Ingram v. State* (1987), Ind., 508 N.E.2d 805, 808–809. Schiro cites no evidence from the record showing unreasonable professional judgment on these seven issues. He does not give the basis on which he concludes the matters include any reversible error; he does not state the basis for the motion to dismiss or to set aside the verdict, or any of the instructions at issue, or the basis for objection to the evidentiary rulings.

[13] One of the issues involved a state's rebuttal witness, Linda Summerfield, who detailed an armed sexual assault which Schiro perpetrated against her. Schiro claims counsel should have more effectively cross-examined her and objected to an array of photos from which she picked him as her assailant. First, there is no showing as to what information might have been gained by further cross-examination of this witness, and second, Summerfield's testimony did no more than repeat one instance of as many as twenty-three instances of other unrelated sexual assaults Schiro committed which he himself related in a thirty-page statement.

(E)

[14] Schiro also cites counsel's failure to respond to his family's assertion the psychiatric witness, Dr. Osanka, tried to "shake him down" for an extra fee as a condition for the most favorable testimony. The trial judge found this story to be incredible. It rested on multiple hearsay as out-of-court declarations attributed by Schiro to his parents. The fact of this alleged "shakedown" was not shown in evidence and Schiro's parents never testified or told anyone else that this incident occurred.

(F)

Finally, Schiro claims counsel was deficient in not preventing jurors from seeing him transported in shackles. It has been held that reasonable jurors can expect a criminal defendant to be in restraints during breaks and while being transported. *Jenkins v. State* (1986), Ind., 492 N.E.2d 666, 669. We have distinguished between a prisoner appearing in court in bonds or shackles as in *Walker v. State* (1980), 274 Ind. 224, 229, 410 N.E.2d 1190, 1193–1194, and when being transported and seen incidental to that. *Sweet v. State* (1986), Ind., 498 N.E.2d 924, 929, requires a showing of actual harm where jurors see a defendant being transported in restraints. The trial court was justified in finding Schiro demonstrated no inadequacy in representation in any of these areas.

III

[15–20] Schiro claims the aggravating circumstance of intentional killing could not be considered at the penalty phase because the felony murder as charged lacked the requisite element of *mens rea* in committing the underlying rape. He attempts to apply a fundamental double jeopardy rule that a conviction of a lesser included offense is an acquittal of the greater offense. An aggravating circumstance, however, is not an offense. A person convicted of either type of murder, that is, intentional killing under IC 35-42-1-1(1), or felony murder IC 35-42-1-1(2), can be shown to contain the aggravator of intentional killing justifying the imposition of the death penalty. One can be found guilty of felony murder where the intention was to commit the underlying felony without necessarily

post-conviction relief which was denied by Special Judge James M. Dixon on May 29, 1984. This court affirmed the trial court's denial of post-conviction relief on June 28, 1985. *Schiro v. State* (1985), Ind., 479 N.E.2d 556. On February 24, 1986, the United States Supreme Court denied Schiro's writ of certiorari to vacate the death sentence. *Schiro v. Indiana* (1986), 475 U.S. 1096, 106 S.Ct. 1247, 89 L.Ed.2d 355.

Thereafter Schiro instituted a petition for writ of habeas corpus in the United States District Court Northern District of Indiana, South Bend Division. Judge Allen Sharpe remanded to the state court, allowing Schiro to exhaust all available state remedies as required for federal habeas corpus proceedings pursuant to 28 U.S.C. § 2254(b); *Ex Parte Hawk* (1944), 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572. Subsequently, on March 5, 1987, Schiro filed the instant action, his second post-conviction relief petition. He filed the timely motion for change of venue from the trial court and Monroe County Circuit Judge John Baker was appointed special judge, qualified, and assumed jurisdiction on March 25, 1987. Schiro's petition for post-conviction relief was denied by Judge Baker.

The issues raised in Schiro's direct appeal to this court are:

1. trial court error in dismissing four allegations of error based on a finding they were *res judicata* or waived as available but not taken in direct appeal at the original post-conviction relief petition;
2. ineffective representation of counsel at trial, in the direct appeal, and in the first post-conviction relief petition;
3. the jury's guilty verdict on felony murder was a conclusive finding of lack of intent such that a possible death sentence was foreclosed; and
4. accumulated error on all above issues which amounts to prejudice warranting reversal.

[1, 2] The post-conviction petitioner bears the burden of establishing the grounds for relief by a preponderance of the evidence. Rule PC 1 § 5. The PC 1 hearing judge is the sole judge of the evidence and the credibility of the witnesses. *Popplewell v. State* (1981), Ind., 428 N.E.2d 15, 16. A petitioner who has been denied PC 1 relief is in the position of one who has received a negative judgment; he will not obtain a reversal unless the evidence on this point is undisputed and leads inevitably to a conclusion opposite to that of the trial court. To prevail on a claim of ineffectiveness of counsel, a petitioner must satisfy both sides of a two-prong test. He must prove counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Then he must prove that such substandard performance was so prejudicial as to have deprived him of a fair trial. A fair trial is denied when the conviction or sentence resulted from a breakdown in the adversarial process which rendered the result unreliable. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh. denied* (1984), 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864; *Lawrence v. State* (1984), Ind., 464 N.E.2d 1291.

I

Schiro claims it was erroneous to dismiss four sections of his petition which alleged a) failure of the statute to provide guidelines for consideration of the jury's recommendation and for appellate review of sentences; b) error in admitting a search warrant, affidavit, and physical items; c) error in excluding a handwritten document, and d) error in providing verdict forms. The trial court found these matters were either *res judicata* or waived as available but not taken in direct appeal or the original PCR petition.

[3–5] The purpose of the post-conviction relief process is to raise issues not known at the time of the original trial and appeal or for some reason not available to the defendant at that time. Where an issue was available to the defendant on direct appeal but not pursued, it is waived for post-conviction review. *Sims v. State* (1988), Ind., 521 N.E.2d 336, 337. An issue which is raised and determined adverse to

petitioner's position is *res judicata*. *Ingram v. State* (1987), Ind., 508 N.E.2d 805, 807. In Schiro's direct appeal this court spoke directly of guidelines for considering the jury's recommendation and for appellate review of sentences. Our discussion included the standard of review of death sentences where the court's judgment is contrary to the jury's recommendation, the degree of conclusiveness regarding a jury recommendation of leniency, double jeopardy, where both the jury and the judge consider the imposition of the death penalty where their views are in conflict, and the finding that the judge independently considers the same facts on the same standards as the jury. *Schiro*, 451 N.E.2d at 1054–1058. Questions of legality of the search warrant, affidavit, and seizure of physical items were fully discussed and disposed of on direct appeal. Schiro's contention concerning the failure of the trial court to admit as evidence a certain handwritten document was fully presented and disposed of in the opinion on direct appeal. This court noted the document was given to a witness by a third party who said Schiro wrote it. The witness did not authenticate the document through knowledge of handwriting or presence at its penning, or any other accepted basis to authenticate a piece of handwriting. The only basis he had to believe the document was the out-of-court declaration of the person who gave it to him. We upheld the trial court's finding an insufficient foundation existed to permit admission of the document.

Finally, the direct appeal opinion considered and disposed of, adverse to Schiro, his contention he was harmed by lack of some necessary verdict forms. The entire record of the trial and the original PCR petition were put into evidence in the instant cause. The trial court had the ability to read the opinion and compare issues, and the power to dismiss these issues disposed of in this court's prior proceedings. The trial court properly found all four issues were so disposed and there was no error in dismissing them as *res judicata*.

II

Schiro claims in the instant cause there were several instances of inadequate assistance of counsel at the trial level and that subsequent counsel were deficient in not raising these issues on direct appeal or original post-conviction action. The state responds Schiro was not entitled to raise these issues in a subsequent post-conviction petition and moreover, when examined, these allegations fail to show prejudice or performance below the norms of professional representation. Schiro claims there were serious matters he brought to his attorney's attention before and during trial and that trial counsel brushed them off and failed to raise them. The record shows that after all these alleged events, when asked at the end of trial if he was satisfied with his representation, Schiro responded in the positive. He then accepted the same lawyer to prosecute his appeal. He now says counsel failed to present certain issues he wanted raised on appeal. However, when the time came to present his original post-conviction petition, Schiro failed to allege even one of these trial or appellate level matters.

The court of appeals recently stated in *Alston v. State* (1988), Ind.App., 521 N.E.2d 1331, 1335, that they would not "take a step backward and create a new vehicle by which a defendant could use a PCR to attack a previous PCR on the grounds of incompetency of counsel in that PCR hearing, and then use yet a third PCR to attack the competency of counsel of the second PCR and so on in perpetuity." In *Lane v. State* (1988), Ind., 521 N.E.2d 947, this Court noted that ineffective assistance of trial counsel would have been an issue available in the post-conviction petition. "*Lane*'s allegation of ineffective assistance is clearly an attempt to circumvent Rule PC 1, section 8, in order to present evidence on issues that had been waived." We stated further, "*Lane* cannot evade PC Rule 1, section 8, just by typing the words 'ineffective assistance of counsel.'" *Id.* 521 N.E.2d at 949.

[6, 7] If a petitioner is to prevail on a claim of ineffectiveness of counsel he must

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intending to commit the murder. It does not follow, however, that one convicted of felony murder cannot be shown to have intentionally killed the victim while perpetrating the felony. IC 35-50-2-9 provides in pertinent part:

(a) The State may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery. (emphasis added).

The crimes of murder and felony murder each contain elements different from the other but are equal in rank. One is not an included offense of the other and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider. Count I here, under IC 35-42-1-1(1), did not charge Schiro with intentionally killing but with knowingly killing. Thus the jury in the guilt phase never confronted the issue of intentional killing and its verdict could not be considered to have included any conclusion on that issue. The court then properly proceeded to the penalty phase pursuant to IC 35-50-2-9, and the jury determined that the aggravating circumstance existed in that Schiro committed the murder by intentionally killing the victim while committing or attempting to commit rape and criminal deviate conduct. In this same statute, § (f)(e) provides that the judge is not bound by the recommendation of the jury, however, he must base his decision upon the same standard the jury was required to consider. The jury made their finding and the trial judge subsequently made has. There is therefore no error presented on this issue.

IV

Schiro claims that even if individually none of the above issues raise sufficient prejudice to require relief, cumulatively they do. Since we find no error on any of the issues above, no prejudicial error is presented in their accumulation.

The trial court is affirmed.

SHEPARD, C.J. and GIVAN, J. concur.

DeBRULER, J., dissents with separate opinion in which DICKSON, J., concurs.

DeBRULER, Justice, dissenting.

In this case appellant was charged in three separate counts. Count I charged murder as a knowing killing of the victim Count II charged murder as a killing in the course of a rape of the same victim. Count III charged murder as a killing in the course of deviate sexual conduct. The jury was charged on all counts, and returned but a single verdict, namely guilty on Count II. As to the other counts, the verdict was entirely silent in regard to guilt or innocence of appellant. The law requires that the jury verdict be deemed the legal equivalent of verdicts that the defendant is not guilty of the felonies charged in Counts I and III. *Buckner v. State* (1969), 252 Ind. 379, 248 N.E.2d 348. *Smith v. State* (1951), 229 Ind. 546, 99 N.E.2d 417. *Cochran v. State* (1965), 246 Ind. 680, 208 N.E.2d 685, which appears to hold to the contrary is not, but in a waiver case. There the Court held that the double jeopardy claim against retrial was waived by filing a motion for new trial. Even if Cochran is valid law today, it does not apply here because appellant took no action between the guilty verdict on the murder charge of knowingly killing and the judge's sentencing finding of the aggravating circumstance that appellant had intentionally killed in the course of the rape, which one might deem a waiver.

At the trial, the prosecution used every resource at its disposal to persuade the jury that appellant had a knowing state of mind when he killed his victim. It failed to do so. At the sentencing hearing before the jury it had an opportunity to persuade the jury that appellant had an intentional state of mind when he killed his victim. The jury returned a recommendation of no death. At the sentencing hearing before the judge, the prosecution had yet another opportunity to demonstrate an intentional state of mind, and finally succeeded. In my view, the silent verdict of the jury on Count I, charging a knowing state of mind, must be deemed the constitutional equivalent of a final and immutable rejection of the State's claim that appellant deserves to die because he had an intentional state of mind. That verdict acquitted appellant of that condition which was necessary to impose the death penalty under this charge. *Burlington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). The difference in the two states of mind is significant and too esoteric in this instance. In the one, a person acts with awareness that he is so acting. In the other, a person acts with an objective to so act. IC 35-41-2-2. To accord the difference, one would have to believe that a person can be presently unaware that he is strangling another, while at the same time having a goal presently in mind to strangle such other person.

I would reverse the judgment and remand with instructions to grant post-conviction relief in the form of a new sentence of years upon the conviction for felony murder.

DICKSON, J., concurs.

All Justices Concur

) 1181 S.329)

STATE OF INDIANA)
) SS:
COUNTY OF BROWN)

IN THE BROWN CIRCUIT COURT
CAUSE NO. 81 CR 243

STATE OF INDIANA,
Plaintiff
v.
THOMAS N. SCHIRO,
Defendant

FILED
FEB 22 1983
CLERK BROWN CIRCUIT COURT

NUNC PRO TUNC ENTRY
PRONOUNCEMENT OF SENTENCING

The Defendant, Thomas N. Schiro, having been found guilty of Murder while committing and attempting to commit rape, by a jury on the 12th day of September, 1981, which verdict was: "We, the jury, find the defendant guilty of Murder while the said Thomas N. Schiro was committing and attempting the crime of rape as charged in Count II of the information." William J. Yeager, Foreperson; dated September 12, 1981. The Court entered judgment of conviction of the said crime of Murder/Rape.

On September 15, 1981, the jury having been instructed to return, appeared. Present were Jerry Atkinson, Deputy Prosecuting Attorney for the State of Indiana; the Defendant, Thomas N. Schiro, with his counsel, Michael Keating; and the members of the jury.

A hearing pursuant to Indiana Code 35-50-2-9 was held concerning the recommendation of sentencing. Both the attorney for the State and the attorney for the Defendant moved to incorporate the entire evidence of the trial. Said motion was granted by the Court. Arguments were made by the attorneys, instructions were read to the jury.

The jury, after due deliberation, returned unanimously with the recommendation that the death penalty not be imposed upon the Defendant, Thomas N. Schiro. The matter was set for sentencing on October 2, 1981.

On October 2, 1981, this Court having reviewed the evidence of the trial and having considered the written pre-sentence report, and having heard the arguments of counsel and the statement of the

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In the Matter of Brian G. EICHELHARDT.
No. 89S00-8906-DI-111.
Supreme Court of Indiana
Feb. 9, 1989.

ORDER ACCEPTING RESIGNATION

Comes now Brian G. Eichelhardt, an attorney admitted to the Bar of this State, and tenders his resignation from the Bar pursuant to Admission and Discipline Rule 23, Section 17.

And this Court, being duly advised, now finds that Brian G. Eichelhardt has met the requirements of the above noted rule and, accordingly, that his resignation should be accepted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Brian G. Eichelhardt is hereby removed as a member of the Bar of this State, and that the Clerk of this Court is directed to remove his name from the Roll of Attorneys.

IT IS FURTHER ORDERED that Brian G. Eichelhardt must comply with the provisions of Admission and Discipline Rule 23, Section 4, in order to become eligible for reinstatement at a future date.

The Clerk of this Court is directed to forward notice of this Order in accordance with the provisions of Admission and Discipline Rule 23, Section 3(d) governing disbarment and suspension.

Costs of this proceeding are assessed against the Respondent.

All Justices Concur

Defendant, gives the following reasons for the imposition of its death sentence.

These are the aggravating circumstances which the State has proved beyond a reasonable doubt. Under Indiana Code, Section 35-50-2-9, subsection [1] The Aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:
(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

1. The verdict of the jury on September 12, 1981, found the Defendant Thomas N. Schiro guilty of Murder while committing and attempting statutory rape.

2. The jury rejected the plea of insanity by its verdict.

Since aggravating circumstances were proven beyond a reasonable doubt, it remains to consider whether any mitigating circumstances exist and outweigh the aggravating circumstances.

As for mitigating circumstances, the Court finds none. Under Indiana Code § 35-50-2-9, subsection (c) The mitigating circumstances that may be considered under this section are as follows:
(1) The defendant has no significant history of prior criminal conduct.
(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.
(3) The victim was a participant in, or consented to the defendant's conduct.
(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.
(5) The defendant acted under the substantial domination of another person.
(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.
(7) Any other circumstances appropriate for consideration.

The statute provides, as a mitigating circumstance, whether (1) the Defendant has no significant history of prior criminal conduct. The record in this case shows numerous instances of prior criminal conduct by the Defendant.

(a) David Crane, M.D., the attorney and psychiatrist, indicated that from a review of the autobiographical statement by the Defendant

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submitted into evidence by the Defendant's attorney, which indicated that Defendant had committed numerous rapes and acts of criminal deviate conduct, is a dangerous person, but like the Court appointed psychiatrists, found the Defendant to be sane at the time of the offense.

(b) The Defendant's witness, Mary T. Lee, with whom the Defendant had lived, testified as to vicious sadistic assaults on her infant under the age of two years, by immersing the said infant under water until the child stopped breathing and then resuscitating the infant. Mary T. Lee also testified that he had knocked out her front teeth with his fist.

(c) Linda Gail Summerford, a witness for the State, testified at length of a violent rape committed by the Defendant, in the presence of her child, a victim of cerebral palsy, and under threat of harm to said child. In her testimony she identified the Defendant, and Defendant's counsel had no questions and made no objections to her testimony.

(d) The Defendant had been previously convicted of robbery, a Class C Felony, in Vanderburgh County, Indiana, and was on work release when arrested for this crime.

(e) The Defendant's own witness, a psychologist, Dr. Frank Osanka of Naperville, Illinois, who is a behavioral consultant, in his sixty hours of review, by personal interviews and by tape with the Defendant, gave various illustrations which the Defendant had described of a wide range of deviate sexual behavior, including voyeurism, exhibitionism, sexual sadism, necrophelia, sexual telephone harrassment and other disorders.

Indiana Code § 35-50-2-9 provides two mitigating circumstances relating to Defendant's mental health:

> (2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.
> and
> (6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(a) The testimony of the Court appointed Psychiatrists, Charles H. Crudden, M.D., and Bernard A. Woods, M.D., both indicated

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that the Defendant is in good contact with reality and is not psychotic or insane. His conversations were relevant and coherent, with a good understanding of the charges against him and the possible consequences of these charges, as well as an understanding of the roles of the defense attorney, the prosecuting attorney, the jury and the Judge. Their prognosis for the Defendant is very poor and they concluded that this Defendant is now and will be a dangerous person in the community.

(b) The record indicated that the Defendant has no remorse and is violent and sadistic. The Defendant's Psychologist and own witness, Dr. Frank Osanka, indicates that the Defendant is "overpowered by the need for erotic release".

(c) The fact that the Defendant committed these crimes, as the record shows, with gruesome, sadistic acts, including necrophelia, but nevertheless wore gloves so that there would be no trace of fingerprints, and transported said gloves to his girlfriend, Mary T. Lee, for disposal, as he had likewise transported the dildo to Vincennes to be thrown in a waste barrel behind a bar, indicated the Defendant's thoughtful planning to escape being caught, and malice in the crime for which he has been convicted. This shows that he planned the crime and planned how to avoid its consequences, showing Defendant's appreciation for the wrongfulness of his conduct and the consequences of his actions. This shows that Defendant had unimpaired capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

(d) This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial, except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation.

The Statute also provides as a mitigating circumstance,

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(3) The victim was a participant in, or consented to, the defendant's conduct.

The victim obviously did not consent to being murdered. Defendant was also found guilty beyond a reasonable doubt, of raping the victim, therefore the victim could not have consented to being raped.

The Statute also provides,

(4) the Defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

There is no evidence of an accomplice in this record.

The Statute provides,

(5) The defendant acted under the substantial domination of another person.

There is no evidence on this record that shows that any other person substantially dominated Defendant.

The Statute also requires the consideration of,

(7) Any other circumstances appropriate for consideration.

The age of the Defendant is twenty years. The Court does not find this to be a mitigating circumstance.

Since the State proved "beyond a reasonable doubt the existance of at least (1) of the aggravating circumstances alleged", (Indiana Code § 35-50-2-9, Section 9(9)) and the Court finds no mitigating circumstances to outweigh it, the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.

The Defendant is to be executed, as by law provided, on the 28th day of January, 1982, before sunrise.

The Defendant is remanded to the custody of the Sheriff.

Samuel R. Rosen

SAMUEL R. ROSEN, JUDGE
BROWN CIRCUIT COURT

Dated: October 2, 1981

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Vacation of accused's conviction of assault and battery with intent to gratify sexual desires did not require vacation of habitual criminal sentence on theory that the habitual criminal charge was coupled with the vacated assault and battery charge and not rape charge of which accused was also convicted. McCormick v. State, 1974, 317 N.E.2d 428, 262 Ind. 303.

79. Review—In general

Robbery conviction would not be vacated where prosecutor filed habitual offender allegation only six days before trial was scheduled, but defendant did not present any explanation of manner in which he was prejudiced by timing of additional charge, even though charge carrying potential of substantial penalty would not normally be labeled matter of form. Russell v. State, 1986, 497 N.E.2d 136.

Probation officer's testimony as to defendant's admissions to having been convicted of and sentenced for two prior felonies forming basis of habitual offender count, without any showing that defendant had been given *Miranda* warning at time of admissions, was not fundamental error so as to warrant relief absent contemporaneous objection, where there was no question but that defendant was habitual offender. Foster v. State, 1985, 484 N.E.2d 965.

Although sentencing court's language ordering defendant sentenced to ten years for the first count and second count, habitual criminal for the offense of the first count, dealing in a narcotic drug was somewhat confusing, the Supreme Court would indulge in a presumption that the trial judge intended to enhance the sentence on the first count by 30 years due to defendant's status as an habitual offender. Radford v. State, 1984, 468 N.E.2d 219.

Where the trial court, in respect to habitual offender information, sustained defendant's objections to the admission of one of the state exhibits, which purported to show that defendant had two prior unrelated felony convictions in Kentucky, where the state thus had only one prior felony conviction in evidence, and where the trial court then sua sponte dismissed the habitual offender count with prejudice, the action of the trial court did not constitute a finding that the information was, somehow, insufficient; accordingly, the state could not appeal under IC 35-1-47-2 [repealed; see, now, IC 35-38-4-2] requiring the state to appeal "from a judgment for the defendant, on quashing or setting aside an indictment or information." State v. Holland, 1980, 403 N.E.2d 832, 273 Ind. 284.

80. —— Remand, review

Remand for determination of whether trial court, in prior theft case, imposed a felony or misdemeanor judgment was necessary as regards habitual offender count where it was unclear whether the court, in issuing nunc pro tunc order modifying original two-year sentence to one-year term, was revising the penalty to correspond to a finding that the Class D felony punishment was being reduced based on mitigating factors or because court was treating the crime as a Class C misdemeanor. Blatz v. State, 1985, 486 N.E.2d 990.

As trial court imposed sentence for the underlying offense and then imposed an additional sentence for defendant's being an habitual offender, but as habitual offender status is not a separate offense, trial court's sentences were erroneous and had to be remanded for correction. Maul v. State, 1984, 467 N.E.2d 1197.

Imposition of separate sentences of five years for forgery and 30 years on habitual offender determination was error and case had to be remanded for imposition of enhanced sentence of 35 years for forgery conviction. Wendling v. State, 1984, 465 N.E.2d 169.

Reviewing court would not dismiss habitual criminal charge, notwithstanding allegedly nonviolent nature of prior auto theft or characterization of instant crime as mere "purse snatching" and that defendant was only 17 and 20 years old at times his prior felonies were committed; it is not prerogative of reviewing court to interfere with discretionary power of the state to invoke habitual criminal penalties. Rodgers v. State, 1981, 422 N.E.2d 1211.

35-50-2-9 Death sentence

Sec. 9. (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed

in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(10) The defendant was serving a term of imprisonment and on the date of the murder the defendant had twenty (20) or more years remaining to be served before his earliest possible release date as defined by IC 35-38.

(11) The defendant dismembered the victim.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c).

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review. *As added by Acts 1977, P.L.340, SEC.122. Amended by P.L.336-1983, SEC.1; P.L.212-1986, SEC.1.*